

*Ira. Hargrave*

*1764*

*15 H 6.*

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THE  
*Law of Commons and Commoners;*  
OR A  
TREATISE  
Shewing the  
Original and Nature  
OF  
COMMON,  
And the several Kinds thereof,

*Viz.* { Common Appendant, Appurtenant, *Estovers*,  
*Turbary*, *Peſchary* and *pur Cause* of *Vicinage*, of  
Commons in *Groſs*, and *Sans Number*, with the Plea-  
dings in reference to every of them.

AS ALSO

The Powers and Privileges of Commoners, in refer-  
ence to the Soil, to the Lord, to Strangers, and of the Re-  
medies and Actions they may have. Of Declarations, Plead-  
ings, in and to Actions brought by and against Commoners.  
Approvement, Apportionment, Suspension and Extinguiſh-  
ment of Common. Of Grant of Common, and by what  
Words Common ſhall paſs.

TOGETHER

With the Learning of Preſcriptions in General; the  
Form and Manner of Pleading Preſcription, in reference to  
Common, in ſeveral Rules. Of Preſcription and Pleading  
by a Copyholder in reference to Common. Of Evidence to  
prove Preſcription for Common, the ſeveral Cuſtoms of  
Commoners, and of Encloſures.

With ſeveral Forms of Precedents adapted to every  
Sort of COMMON.

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The Second Edition, with large Additions.

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THE  
Law of Commons and Commons;  
OR A  
TREATISE  
Showing the  
Original and Nature  
OF  
COMMONS  
AND THE SEVERAL  
Manner of their  
Acquisition, Extent,  
Privileges, and  
Burden.



With the last of the 17th Century, the  
Commons of England were reduced to  
a small number, and the power of the  
Crown was increased. The Commons  
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# THE PREFACE

## TO THE READER.

**F**ROM those who consider as well the Extent of the *Subject* here presented, (the third part of *England* at least having been computed to consist in Wastes and Commons,) as the Universality of the Object, about which it is concerned; Lords of Manors, Owners of Soil, and Commoners, as well Freeholders as Copyholders; a Treatise of this Nature may hope for a favourable Enter-

## *The Preface.*

tainment, especially if we further consider, that no one hath professedly and designedly written hereof; at which it is to be wondered, if we reflect upon the daily Controversies that arise about the *Rights* and *Titles* of Commoning, the Torts and Damages done to Commoners, and the various *Prescriptions* and Claims which are made to it, and the Nicety of *Pleading* them. I have been particular in the Matter of *Apportionment* and *Extinguishment* of Common, the want of a due Knowledge whereof has occasioned the Loss of many Commons: But I have been the largest upon the Title of *Prescription*, and the ways of laying the same, and particularly upon *Special Prescriptions* with the Rules of *Pleading*, (a Learning as curious as any we have in our Books) as also, I have laid down *Rules* and *Resolutions*, whereby a Man may know when he *fails* in his Prescription, or not, upon the *Evidence*; the Ignorance of such Directions having oftentimes proved fatal  
to



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to such who might have good Cause of Action.

I am sensible it will be *objected*, that I have been too large in setting down some *Cases*, and that I have cited others in two or three places. The first I must confess, and I did it with Design; especially where a *Case* has been imperfectly reported, I have added and amended it by other Reports, which will be a Means to settle the Student's Judgment, and the better fix the Notices thereof in his Memory. And two things I would advise the Student to have a care of; one is, not to take a *single Case* which he finds in some Reports, for undoubted Law, for such are often mistaken, either in the matter of Law, or the Reason of the Resolution. The other is, not to trade in trifling Abridgments.

As to the second *Objection*, I must acknowledge I have cited some Cases in two or three several Places, and I think  
with

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with great Reason, and according to the Grave Advice of the Lord Chief Justice *Hale*; when one Case is branched out into several *Points*, such sprouting Points ought carefully to be split off, and grafted under their *proper Titles*.

In fine, As the Nature of the *Subject* is of a publick Concern, so the Design of the Author is for the common Good, and Advantage of the Professors of the Law. And for that Reason he hopes for a kind *Reception*, and *Pardon* for his *Mistakes*.

THE

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CHAP. XXII.

**AD**

# THE LAW OF COMMONS.

## CHAP. I.

*Of the Kinds, the Original, the Nature and Qualities of Common; and of the Difference between Profit Apprender, and Interest and Easements. The difference between Common and Pasture, Prima Tonsura, Faldagium, Herbagium, Ovile. With several Rules, Maxims, and Diversities, touching Common in general.*

**B**EFORE I proceed to Treat of the Common. Original, the Nature, and the Qualities of Common in particular, it may be proper in the first Place to shew the Derivation and original Use of the Word; and next to mention in general the several Kinds of Common, and the Branches or Species



## The Law of Commons.

cies of those Kinds, with their respective Definitions or Explanations.

Its Derivation.

The *English* Word (Common) is derived from the Latin, (*Commune*) which in *Classick* Authors signifies a thing Common in its Use to all or many, and wherein no Man could claim any Special Ownership or Property : As,

*Mare quidem commune est omnibus.* Plaut.  
*Communisque prius cœlum lumina solis & aura,*  
*Humus, &c.* Ovid.

And hence it is, That a Distinction between *Commune* and *proprium*, appears in the Civil Law, tho' therein the Word *Commune* seems somewhat to vary from its original Signification, as being restrained to particular Societies, Companies, or Numbers of Persons, and in such a Manner, that each Person was esteem'd to have a *quasi* Property in the Thing itself; as, *Qui jurat aliquid proprium non esse, adicere debet, neque sibi communem.* Vide *Pomponius de verbor. Signif.* 239. Sect. 9.

And Note, The Words *Communis*, *Commune*, &c. in these and all other like Instances, are to be taken adjectively, and rather signify the Quality or Accident of the Thing, than the Thing itself.

Definition.

But the Word *Communia*, or Common, as taken substantively, was invented and introduced into our Law-Language, as a Term of Art, and therein properly signifies, a Right or Privilege which one or more Persons claim to take or use some Part or Portion of that which another Man's Lands, Waters, Woods, &c. do naturally produce, without having any Property in such Land, Water, Wood, &c.

For

## The Law of Commons

For he that has the *Property* is the Lord or Owner of the Thing, which *Property* in this Sense cannot be said to be *Common*; so that *Common* and *Property* in our legal Signification seem repugnant, and *opposita inter se*. Vide post pag. 7, 8.

Now *Communia* or Common, in this Sense, Division. is generally divided into four Kinds, viz.

1. *Communia Pasturae*, (or Common of Pasture,) This is a Right or Liberty, which one or more have to feed or fodder their Beasts or Cattle in another Man's Lands, &c.
2. *Communia Turbariae*, (or Common for Turves) is a Right or Liberty of digging Turves in another's Land or Soil.
3. *Communia Piscariae* (or Common of Fishing) is a Right or Liberty of taking Fish in another's Fishpond, Pool or River.
4. *Communia Estoveriorum* (or Common of Estovers) is a Right or Liberty of taking Trees or Loppings, Shrubs, Underwoods, &c. in another Man's Woods, Coppices, &c.

But Note, These *Estovers* are commonly called *Boots* or *Botes*, and are of four Kinds, viz. Species of Common of Estovers.

1. *Estoveria Aedificandi*, (or the Greater House-bote) which is a Liberty to fell and take Timber-Trees, &c. either to repair, &c. ruinous Houses, or to rebuild such as are prostrate by Tempest, Enemies, &c.
2. *Estoveria Ardendi* (or the Lesser House-bote) is a like Liberty to cut and take Tops and Lops, or Shrubs and Under-  

B 2
woods,

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woods, or old decayed and dead Trees, to burn in the House or Tenement.

3. *Estoveria Arandi*, ( or *Plough-bote* ) is a like Liberty to cut and take proper Timber, and other Stuff, for mending the Tenant's Ploughs, Carts, Wains and Harrows, and for making Rakes, Forks, &c. necessary for getting in his Hay and Corn.

4. *Estoveria Claudendi*, or *Estovers of Inclosure*: This is usually called *Hedge-bote*, and is a Liberty to take either proper Timber for making Gates, Stiles, &c. or Boughs, Shrubs, Bushes, &c. to repair Hedges and Fences, or to inclose open Fields, where Corn is sown, &c. *Vide Tradesman's Lawyer*, 263.

And Note, If one has in his Grant, these general Words *de rationabili Estoverio in Boscu*, &c. he may thereby claim all these *Botes* or *Estovers*; and in some Manors the Tenants have them by the Custom, or of Common Right, without any Grant from the Lord. *Vide Chap. 6.*

A fifth Kind of Common may that be esteem'd, where the Tenants in some Manors, claim and have a Liberty of digging and taking Sand, Gravel, Stone, Coal, Oar, &c. in the Lord's Soil, Pits, Quarries, or Mines; for which see *Co. Lit.* 41 *b.* Though this kind of Common may well be reduced under the Head of *Turbary*; of which hereafter.

Species of  
Common of  
Pasture.

*Common of Pasture*, which is the most usual, and whereof we shall principally treat, is divided into four Sorts, or Species, *viz.*

I. Com-



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1. Common Appendant. Touching which,  
See Chap. 2.
2. Common Appurtenant. See Chap. 3.
3. Common in Gross. See Chap. 4.
4. Common *pur cause de Vicinage*. See  
Chap. 5.

And all these except the last are either,

- |            |   |  |
|------------|---|--|
| 1. Certain | { | <ol style="list-style-type: none"> <li>1. In it self, as Common for a certain Number of Beasts. Or,</li> <li>2. In Consequence, as Common for all Beasts <i>Levant</i> and <i>Couchant</i>.</li> </ol> |
|------------|---|--|

- |              |   |  |
|--------------|---|--|
| 2. Uncertain | { | <p>As Common for Cattel <i>Sans</i> Number. Or,</p> <p>Common <i>pur cause de Vicinage</i>, &amp;c.</p> <p><i>Quare</i>, of Common in Gross.</p> |
|--------------|---|--|

And another sort of Common of Pasture may be that which in *Norfolk* is called *Shack*, concerning which you may read in *Sir Miles Corbet's Case*. In 7 Co. & *vide Post*, Chap. 14.

There was also a sort of Common of Pasture pleaded in *Stone* and *Musenden's Case*, which strictly was none of these *Supra*. There a Man prescribes, That he and his Wife, and all those whose Estate they have in a certain Messuage, have used to have Common for all manner of Beasts Commonable, as to the said Messuage appertaining: And *per Cur'*. Though this by the strict Rules of Law be neither Common appendant, nor appurtenant, and upon Demur-



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rer had been ill, yet after *Verdict pro* the Court will allow it good, and intend it to be Common appurtenant. Note, The Doubt seems to be, for that Common can't be said appurtenant to a Messuage only. *Vide post. Vaughb. 253.*

The Original.

The Original and Commencement of *Common of Pasture, &c.* seems to be briefly thus: When the ancient Kings of *England* distributed to their Lords, or Barons, certain Circuits of Ground, consisting for the most part of Arable, Pasture, Waste and Woods, called Manors; they had a Petty Royalty and Jurisdiction over those that lived within their Precincts, and for Consideration of performance of Civil or Military Services, or yielding such Rents in Corn, Sheep, &c. as was agreed between them, they built them Houses and distributed Parcels of Arable Land to such their Tenants, (when *Villanage* began to be worn off) But because the Tenants could not live to pay and perform their Rents and Services without Cattle to manure and plough those Lands, and those Cattle could not live without Feeding or Pasture; therefore it was necessary for them to feed such Cattle upon such Waste or Pasture, within the Jurisdiction of the said Manor, or some other of the Lord's Wastes in other Places, which the Lord granted and allowed; and this in process of Time was look'd upon as a thing incident to their Tenures, grew to a Prescription, and consequently to a Right. And because the Tenants could not live and be able to perform their Services without Fire, nor repair their Houses or Fences without Timber and Wood, therefore of Necessity

## The Use of Commons

cessity also they must have Common of *Estovers* in some parts of the Manor, or in some other of the Lord's Woods near and convenient; the like of the Common of *Turbary*, &c. As for Common *pur cause* of *Vicnage*, and the Original of it, *vid. infra Chap. 5.*

Now the Nature of Common, I mean Common of Pasture, (which is the most general Common,) is a Feeding with the Mouths of the Cattle; and Common appertains not to the Tenant, nor is it his, until it be taken by the Mouths of his Cattle; and if a Stranger cuts the Grass, the Commoner cannot take it away, nor have an Action of Trespass; and it's said in *Bridgeman's Rep. c. 10.* He that hath Common in the Lands of another, hath nothing to do with the Land any more than a meer Stranger, but only to put his Cattle therein, and to let them feed there with their Mouths. But yet he hath more than so; for he shall have an Action on the Case against any who dig Pits in the Soil, *per quod profectum suum amisit. Vide plus infra tit.* What Actions a Commoner may have.

The Nature.

And it is to be observed, That there are two and Qualities. Notions or Senses of the Word *Communia*: The one, as it signifies that Interest which one Commoner hath against another, not to have the Common surcharged; and is that Interest to which the Writ *de admesuratione Pasturæ* relates, which only lies for Commoner against Commoner, and not for a Commoner against the Lord, or for the Lord against a Commoner, as is clear by *Fitzherbert's Natura Brev. p. 125. a.*

## The Use of Communia.

And in this Sense there may be *sola & separata Communia*. For either by Grant or by Prescription, one only, and no more, may have a Right of Common with the Lord or Grantor; so also in this Sense one part of the Tenants of a Manor may have the sole Right of Commoning in a certain Place, excluding the other part of the Tenants, and may claim to have therein, *solam & separatam Communiam, a ceteris Tenentibus Manerii*. 4 Co. Royston's Case.

The other Notion of the word *Communia* is, when one or more hath a Right to pasture with the Owner of the Soil; and in this Sense it is impossible for a Man to have *solam & separatam Communiam*. For one alone cannot have that which is to be had jointly with another, nor can he do that alone, which is to be done with another.

So as a Man may have *solam & separatam Communiam* in that Sense, that none is to be a Commoner but himself, but not in the Sense, that none should depasture the Land but he; for *Communia* cannot signifie an Absolute or Entire severally, and as 'tis a Contradiction; to say, That a Common (which must be to more than one) can be a several Thing, and belong but to one; so it is an equal Contradiction, That what in its Nature is to be the Right of one only, can yet be common, and the Right of more than one: For others cannot have what is only to be had by me, no more than I can have alone what is to be had by others in Common with me.

And therefore *sola & separata pastura* may be enjoyed by one, or by many jointly, and  
by



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by way of Survivor, but not many, by different Titles, as belonging to several Freeholds. For *sola & separalis Pastura* can be but *solis & seperatim*. Co. Lit. 164.

Also, A Man cannot have an Assize of Common in his own Soil, nor an *admensuratio Pasturae*. And tho' a Common be a Thing that lies in Grant, yet he cannot grant it to himself, nor can any other grant it in his own Soil to him.

Therefore one, or more, may have *solam & separalem Communiam*, from other Commoners, but he cannot have it (*separate*) from the Lord, who is no Commoner. Vaugh. 256. Vid. infra.

Note, A Difference between *Communis Pastura* and *Communia Pasturae*. 3 Lev. 104. Vid. infra.

But for the further explicating the Nature and Qualities of Common, let us treat of the Difference between it and other Things and Interests which have some Semblance thereunto, as Pasturage, *vestura terrae*, *tonsuræ terræ*, Herbage, Foldage, Sheepwalks, &c.

Note, A general Difference between Profit Appreder, and the Land or Freehold it self, or an Interest in the Land. He that hath but a Profit Appreder, as a Commoner hath, cannot bring an Action of Trespass, *quare clausum fregit*, because he hath not the Soil, but only the Benefit of Feeding. But in *Bridgwater's Case*, Cro. Eliz. 421. In Trespass on Not guilty, the Verdict was found, That the Plaintiff was seised of the Manor of P. and that in the said Manor, there was a Meadow call'd W. containing 80 Acres, where-  
of

Note, A difference between Profit Appreder and the Land.



of the Place where, &c. is Parcel ; and that from Time to Time, whereof, &c. this Meadow hath been divided by Lot between divers Persons, *pro capione feni de herba inde provenientes* ; and that the Plaintiff, and all those whose Estate, &c. have used to have allotted to them yearly out of the said Meadow 13 Acres, and that the Place where, &c. was allotted to the Plaintiff. *Per. Cur.* The Land being allotted to him, the Plaintiff has an Interest and Freehold in him for the Time, and may well maintain a Trespass *quare clausum fregit*.

Difference between Common and Pasture.

As to the Difference between *Common* and *Pasture*, whether called Pasturage, Herbage, *tonsura terræ*, &c. it stands thus, and is very material to be known, by those who would be well acquainted with the Nature of *Common*.

A *Præcipe quod reddat* lies of Pasture, but not of Common. 27 H. 8. 12.

One may prescribe for *sola & separalis Pastura*, excluding the Lord ; but it is not so of Common, *vide infra*. And one may prescribe to have the sole Pasturage in the Soil of another after the Corn cut. 1 Mod. Rep. 75. 2. Bulstr. 87, 88, 89. Whistler and Stockman.

They that claim *solam & separalem Pasturam*, must either claim it under one immediate Title, or that which was originally one Title ; as if I grant to J. S. and J. D. *solam & separalem Pasturam*, they have it under one and the same Title. But if they will divide, still they stand under one original Title, tho' the Share of each be by a particular Title. *Cart.* 201.

Nota

Note also, Tho' an Action of Trespafs does not lie for a Common, yet it lies for one or more, who claim *solam & separalem Pasturam*, and this, whether they claim it jointly or severally. *Vide 2 Aff. 48. Co. Lit. 4. b. Vaugh. 254.* Tho' one may prescribe to have *sola & separalis Pastura*, excluding the Lord, yet he cannot have *solam & separalem Communiam*, excluding the Lord; but he may have it, excluding other Commoners.

And therefore to prescribe to have in such a Part of the Lord's Lands, either *Communiam*, or *Pasturam Communem*, or *solam & separalem Communiam*, or *solam & separalem Pasturam Communiam*, or *solam & separalem Pasturam*, common to them; all these are of the same Import with *Communiam*, and therefore exclude not the Lord.

But the granting *solam & separalem Pasturam*, of any Lands, properly signifies the Exclusion of all other Persons to have Pasture there, but the Grantee or Grantees; and in that Sense the Word *Solam*, signifies as much as *totam Pasturam*. And the whole Pasture is supposed to pass by such Grant to the Grantee. And yet the Grantor, by adding special Words to the former, may restrain the Extent of such general Words, for his own Benefit; as if these Words follow, *viz. pro duabus vaccis tantum*, or *pro averiis Levantibus & Cubantibus* on a certain Tenement, &c. Such a Restriction shall be expounded for the Benefit of the Grantor, and he by his Beasts, may take the Residue of the Common. *Vide Vaugh. 256, 258.*

If

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If a Man grant to another, Pasture for 20 Oxen in *D.* he shall not have this Pasture but where the Grantor pleaseth. Otherwise it is of Common in such Case, for there the Grantee shall have the Feeding, *Per my & per sou.* 2 *Bulst.* 88.

And so, if *A.* seised of Land in Fee, grants the Pasture of the Land to *B.* for Years, and *B.* licenseth *C.* to put in his Beasts; this Lease of Pasture is good without Deed, and the Licence also; for this is a Lease of Land to pasture, and not like to Common of Pasture; *Aliter*, if he had granted Pasture for certain Beasts. 2 *Roll. Abr.* 62, 63. *Mountjoy's Case.*

*Ovile.*

*Ovile* is of the Nature of Common, and *cur-sus Ovium* will not include the Land; and therefore in *Huddleston's Case*, where a Lease was made of 100 Acres of Land, and one *Ovile* or Sheepwalk, *cum pertin.* in *Norf.* The Court was of Opinion, That the Sheepwalk was appendant to the Land, and therefore will pass without Deed, as Tithes will pass by grant of the Glebe properly; unless other matter be shewed to the contrary, the Freehold is in him who has *primam Tonsuram*, and those that have the After-pasture, have it but in the nature of Common; and an *Ejectment* lies *primae Tonsurae*, the *prima Tonsura* being the most beneficial Part of the Year. 2 *Roll. Rep.* 61. *Huddleston* and *Woodrust.* *Cro. Car.* 236. *Ward* and *Pettyfer.*

*Prima Tonsura.*

*Herbage.*

Reservation of Rent out of the Herbage of Land may be good, *aliter* of Commons. 1 *Inst.* 142. a.

*Pasturage.*

As to Pasturage, it may be laid so as to make it Common in some Respect; as in Trespass for depasturing his Close, the Defendant



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Defendant justifies, because the Prior of *D.* was seised in Fee of such a great Close in *D.* and was seised in Fee of the Pasturage in the Place aforesaid, for all his Sheep *Levant* and *Conchans* in the said great Close at all Times in the year: This is not properly Common, for then it would be extinct; but it is in the nature of Common *Appendant*, and cannot be severed from the Soil by Grant, and it is idle to make Prescription to it. *Cro. Jac. 542. Daniel and the Earl of Hereford.*

In Trespass the Defendant pleads in Bar, That he, and all those whose Estate he hath in the Manor of *A.* have Time out of Mind, had Pasturage for two Geldings in the Place where, &c. and held that such Common may well be claimed by the Name of Pasturage. *Sir John Thornbill and Lassells. Cro. Jac. 27.*

*Foldcourse* is in the nature of Common certain, and may well be divided or annexed to Parcel of the Manor, and that there cannot be any Prejudice to the Tenants of the Manor thereby, &c. See the Case of *Spooner and Day. Cro. Car. vid. post. 50.*

One prescribes to have *Libertatem faldagii* in *D.* & *pro meliori Pasturatione omnium*, &c. the Inhabitants of the said Town having Lands in the said Town, every second Year let their Lands lie fresh; and that the Tenants might erect Herdals on the Land with the Licence of the Lord. This is a good Prescription. And a Difference was taken where one does prescribe to take away the whole Interest of the Land from the Owner, and where a particular Profit is restrained: (But in *1 H. 7. 24. Libera faldia* is no other, but to have the Beasts

Difference  
where one  
prescribes to  
take away the  
whole Interest  
of the Land,  
and where a  
particular  
Profit is re-  
strained.



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of the Tenants to manure the Lands of the Lord, and is only for Sheep.) And so was the Opinion of the Lord Chief Justice *Hale*, *Norf. Summer-Affizes*, 1668, in Case the Plaintiff entitles himself by Prescription to a Foldcourse for Sheep, upon all the Lands in such a Field on *Michaelmas-day*, and so to *Lady-day*, the Lands being unsown; and because the Defendant put on Sheep, *Per quod, &c.* that the Owner may put on Sheep, and feed his own Grounds before *Michaelmas*, unless a Custom be to the contrary, which ought to be laid in the Declaration. *Contra* of a Stranger. *Trials per Pais*, 183.

Difference  
between Com-  
mon and Way,  
&c.

Declaration.

Rules and  
Maxims.

As to the Difference between a Common and a Way, it is to be observed, That a Common must be laid to be Appendant or Appurtenant, or in Gross, because it is an Interest; but so is not a Way, but rather an Eafe, and shall not be laid as Appendant and Appurtenant in a Declaration: And a Judgment in the *King's Bench* was revers'd in the *Exchequer-Chamber*, because the Plaintiff had alledged a Way as Appurtenant to an House. because he claims this in another Manner and Nature than he ought by the Law.

I shall in the next Place mention some general Rules and Maxims of Common, as they lie dispersed in our Books; and which will be more fully explained in the ensuing Treatise.

- I. When one will make to himself a Title to Common, he must do it by Grant or by Prescription; and if it be by Prescription, it must be for such a Common as might

might have a reasonable Commencement.

1 *Cro.* 390. 2 *Brownl.* 64.

2. But for Common Appendant it is not necessary to prescribe in it. For its being Appendant does imply a Prescription. 1 *Brownl.* 177.

3. A Prescription to have Common for all his Cattle commonable, is not good; but to have it for his commonable Cattle, *Levant, &c.* is good. *March* 83.

4. A Man may not prescribe in a Profit Appender to a Thing, unless the principal Thing may have and hath a perpetual Continuance and Durance; therefore one cannot prescribe for Common *Ratione commorantiae*, or *Residentiae*. For no Man can have any Interest in any Common as Appendant or Appurtenant to a House, wherein he hath no Interest but only Habitation, which is altogether uncertain. *Dyer* 70. pl. 41. 1 *Andersf.* 151.

5. A Man may not entitle himself to Profit Appender *in alieno Solo*, by the Common Law, without Grant or Prescription. *Cro. Car.* 542. *Daniel's Case*.

6. Common lies in Grant; but a Grant of Common, not shewing where, or out of what Place, cannot be good: And if it be *ubicumq; Averia* of the Grantor *ierint*; the Grantee, to make his Grant good, must shew the Place where the Grantor's Cattle did go. 9 *H.* 6. 35, 36. Also, Common certain is grantable over by apt Words; but Common incertain is not grantable. *Bro. Common*, 39. Yet see *Bro. Grant*, 87.

7. Where

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7. Where a Man has granted Common for all manner of Beasts in all his Manors, he cannot now approve; but if he reserves a certain Parcel to himself, there he may approve, and the Grantees shall have nothing in that Part. *Bro. Common, 26.*
8. The Owner or Grantee of a Common cannot grant the Common to another's Use; for he hath nothing to do with it but to take it by his own Beasts feeding; and a *Præcipe* will not lie of a Common.
9. *Common in its proper Nature is not incident to a Copyhold Estate, but a collateral Interest gained by Usage: And the Common first used, was granted by the Custom, and is annexed to the Customary Estate, and therefore lost with it. Vide infra, Telv. p. 190. Marsham and Hunter. See the Diversities, infra. N<sup>o</sup> 14.*
10. *The Nature and Quality of a Common is, that it may be suspended or extinguished, Vide post. & 6 Rep. 60. a.*
10. *A Rent cannot be issuing out of a Common: And there cannot be a Suspension of the Rent by inclosing of the Land, in which the Lessee had Common, by the Lessor. Cro. Jac. 678. Sir Nich. Sanderson's Case.*
12. *Cottages have not Common, except in in some particular Places. Vide infra. Co. Mag. Cb. 470. Clayt. 48.*
13. *A Common, which is an Interest, cannot be claimed without alledging to what it appertains, and cannot be made as a meer personal Thing. Otherwise of a Way or other Easement;*



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ment; but Common in Gross in some Sense appertains to no Land. *Vide infra*. He that hath not any Interest, cannot have any Common.

14. No Man can prescribe for Rent or other Charge in another Man's Soil, for no que Estate can be of Things in Grant; yet a Man may have such Charges by Descent from his Ancestors, alledging, That he and his Ancestors, Time out of Mind, &c. have had, &c. — *Vid. infra*, Tit. Prescription.
15. Unity of Possession of so high and perdurable Estate of the Thing claim'd, and of the Land out of which it is claim'd by Prescription, shall destroy the Prescription. *Vid. infra*.
16. Of an incertain Common or Free-foldage, not saying for what Cattle, no Dower is to be had. *Godb. 27*.
17. And in Trial of Common, the Freeholders are not to be Witnesses one for another. *Hob. 92*.
18. And where one claims Common by Grant, he must shew his Title by Deed to the Court. *Yel. 201*.
19. In all Cases of Common the Law does much respect the Usage and Custom of the Place; for therein *Consuetudo Loci est observanda*. And therefore in the Case of Inclosure, where they have been used and accustomed to inclose and keep their Common several; there it shall be admitted good. *Vide 7 Co. 5*.
20. But Note, A tortious User of Common will not give one a Seisin of the Common;

C

yet



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yet Usage of it, Time out of Mind, creates and vests a Right. And what will make a good Seisin thereof or not, see 1 Roll. Abr. 404. X.

### Diversities.

1. Between Actions of Trespass and Actions on the Case, as to intire Damages being found.
2. Between Trespass and Avowry, or *Quod permittat* ; as to the Jury's finding Common belonging to the Number of Acres laid in the Declaration, the one being only for Damages, the other being founded upon the Right.
3. Between what appears on the Verdict, and what of the Plaintiff's own Shewing ; as if one Jointenant, or Tenant in Common, brings an Action solely, and the Defendant pleads Not guilty, and it appears by the Verdict, that the Defendants are Tenants in Common, there the Plaintiff shall have Judgment. *Aliter*, if it appears by the Declaration, or Plaintiff's own Shewing, that he had a Companion not joined with him. *Vid. infra. Harman and Whicblow's Case.*
4. Between Common in Gross, and Common *sans nombre* in Gross. *Vid. infra.*
5. Between Grant of Common, and Grant of Pasture, as to its passing with or without Deed.
6. Between Prescription general and special.

7. Be.

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7. Between excluding the Owner of the Soil from Condition, and Claim for *sola & separalis Pastura*.

8. Between a Prescription for Common in general, and a *modus Communiae*, or a conditional Common.

9. Between, where Common is but Inducement to the Action, and where it is on Title.

10. Where *Modo & forma* in Issues, is material or not.

11. Diversity where one prescribes to take away the whole Interest of the Land, and where a particular Profit is restrained.

12. Also, If a Copyholder prescribes to have Common in the Soil of another, he must prescribe in the Lord's Name. But if he prescribe to have it in the Lord's Waste, there it must be with a *Usitatum fuit*. 1 Bulst. 19.

13. And Note, As Common may be gained by long Sufferance, so it may be lost by long Negligence; by Nonuser as Misuser. 3 Leon. 306. *Communiae enim quandocumque ex longo usu sive constitutione cum pacifica possessione, continua, ex scientia, negligentia aut patientia Dominorum acquiritur; ita etiam amitti potest per Negligentiam & non usum. Bracton.*

14. There is also a fine Diversity in Chud. Difference 1  
leighb's Case, about what Persons may be where one  
seised to an Use, which will give Light to prescribes to  
the Nature of Commons, &c. which take away the  
are annexed to Land: The Diversity is whole Interest  
berwixt Things annexed in Privy to the of the Land,  
Estate, and Things annexed to the Particular Profit is restrained.  
session ed.

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session of the Land, without respect of any Privy ; wherefore a Disseisor, Abator, &c. shall not be seised to an Use altho' he had Notice of it ; for the Use was not executed to the Possession of the Land, which each of them had, but to the Privy of the Estate, which is denied to them all ; for they are not in Privy of Estate, to which the Use was annexed, but to the Possession ; so Tenant for Life, the Remainder in Fee, to the Use of another ; Tenant for Life makes a Feoffment in Fee to one who had Notice, he cannot stand seised to the first Use, because the Use is annexed to one Estate, and the Feoffee is in of another Estate : But of Things annexed to the Land, otherwise it is, as of Commons, Advowsons, &c. Appendants and Appurtenants ; therefore if Tenant in Tail make a Feoffment of a Manor, or Part of it, with the Advowson, &c. the Advowson shall pass as Appendant to the Manor, and not to the Estate of the Land ; for the Estate is discontinued by the Feoffment : So a Disseisor or Abator shall have them as Things annexed to the Land. *Rep. 122. Cudleigh's Case.*



CHAP. II.

Common Appendant.

*The Definition, the Original and Nature of it, and to what it shall be said appendant. The several Sorts thereof. How Title shall be made to it. With what Beasts it shall be used and taken, and with what not. Magna Averia, what.*

**C**OMMON Appendant is, where a Man is seised of certain Arable Lands to which he hath had, Time out of Mind, Common in the Soil of another, for himself and all those who shall be seised of the said Land; there he shall have Common for Beasts commonable, viz. Such as manure or compeiture the same Land to which the Common is so incident or appendant. *Vide Terms of the Law. & Cowel. 4 Co. 37. 2 Inst. 99.* Definition.

When the Lord of a Manor (wherein were great waste Grounds) did infeoff others of some Parcels of *Arable Land*, the Feoffees (*ad manutenendum servitium Socæ*) should have Common in the said Wastes, for Beasts necessary to game and compast the same Land, as incident to the Feoffment; for the Feoffee could not plough and manure his Ground without Beasts, and they could not be sustained without Pasture, and by Consequence the Tenant should have Common in the Wastes of the Lord for his Beasts which did plough and manure or compast his Tenancy; and this was Original.



*tacite* implied in the Feoffment, and incident to it. 4 Co. 67. Co. 2. Inst. 96. Perk. 670.

For if the Lord of a Manor, before the Stat. *Quia Emptores Terrarum* had made a Feoffment of Part of the Manor, to hold of him, the Feoffee should have had Common in the Lord's Wastes as incident or appendant to his Grant. 1 Roll. Abr. 390. C.

Nature.

'Tis of Common Right; therefore need not to be prescribed.

As to the Nature of it observe,

Common Appendant is of Common Right, as appears by the Statute of *Merton, ch. 4.* and must have been Time out of Mind, and commenceth by Operation of Law; and for this one need not prescribe. *Vid. inf.* It cannot be severed from the Soil by Grant, without being extinguished; therefore a Prescription to have Common Appendant, not saying to what Land, shall be void; and if it is appendant to Land, a Prescription thereto is Surplusage. For its being appendant implies Prescription, and therefore needless to prescribe to it. It is not Common Appendant, unless it had been appendant Time out of Memory, &c. for such Common may not be created at this Day. 4 Rep. 37. *Tirringham's Case.* 2 Brownl. 298. Cro. Car. 542. in *Daniel's Case.* 1 Roll. Abr. 401. 4 Rep. 37, 38. 1 Roll. Abr. 396. 26 H. 8. 4.

The Lord may have Common Appendant in his own Tenancy; this Common is natural, for the Lord has Right of Common in the Lands of the Tenant, and the Tenant in the Lands of the Lord. 2 Inst. 85, 474. 2 Brownl. 298.

As for the pleading Prescription to this Sort of Common, *vide infra*.

To

*To what it may be said Appendant.*

It is only appendant to ancient Arable Land, <sup>To antient</sup> and not to Meadow, Pasture, or to an House; <sup>Arable Land.</sup> and tho' some Part may be converted to Pasture, yet the pleading must be, That it is appendant to Land. 4 Rep. *Tirringham's Case.* 26 H. 4.

It cannot be appendant to Land, which is <sup>Not to Land</sup> approved out of the Wastes of the Lord with- <sup>approved.</sup> in Time of Memory. One may prescribe to have Common Appendant to his Manor, (*viz.*) to such Demesnes which are Arable Land. 5 Aff. 2. 4 Rep. 37. b.

Common may be appendant to a Carve of <sup>To a Carve</sup> Land, and yet a Carve of Land may contain <sup>of Land.</sup> Pasture, Meadow and Wood; but it shall be applied to that with which it agrees: And so to a Manor, but this shall be intended to the <sup>To a Manor.</sup> Demesnes of the Manor; and therefore if a Tenancy escheat, the Lord shall not increase his Common by reason of that. There must be a Congruity between the Thing Appendant, and the Object to which it is Appendant. 4 Rep. *ibid.* 3 Aff. 2 Inst. 122.

So it may be Common Appendant, tho' it <sup>To a Farm,</sup> belong to a Manor, a Farm or a Plough-Land; <sup>Plough-land,</sup> and tho' it be on Condition only to have Com- <sup>&c.</sup> mon in it when it is not sowed, &c. 4 Co. 37.

But if one and his Ancestors, and all those whose Estate he hath in a House, have had Common of Pasture for a certain Number of Beasts (*Levant, &c.*) in a certain Place; this is not Common Appendant but Appurtenant. 11 H. 6. 12.

Arable Land.

*Note,* Common Appendant can only be appendant to Arable Land. But if a House be afterwards built upon that which was at first Arable; and tho' Part of it be converted into Meadow or Pasture, yet it still may be claimed as Common Appendant. And he shall have this Common for all his Beasts which he keeps upon that which was anciently Arable Land, tho' since converted to Meadow, &c. 4 Co. 37.

He that claims Common by force of a Prescription, as an Inhabitant of a Village, shall have no other Beasts to common there but those that are Levant and Couchant within the Village. 1 Roll. Abr. 398. G.

Shack.

*Note,* In divers Places the Lands of divers Men lie intermix'd in little Parcels in large Fields, and they use there to *Intercommon* promiscuously from Harvest till the Land be sowed again; this must be Common Appendant, And in such Case, Tho' any of them enclose his Part of such Field, yet the rest do use to take Common with him afterwards in his Inclosure as they did before. And this in *Norfolk* is usual, and there call'd *Shack*. 7 Co. 5.

Also if in one Town one has divers Parcels of Land inclosed together, in which the Inhabitants have used to have *Shack* by Passage into it, by Bars and Gates, with their Beasts; this is to be taken as Common Appendant or Appurtenant. But if in the Towns of *D.* and *E.* the Usage hath been, That every Owner hath used to inclose his own Lands from Time to Time, and so to hold it in; there the Usage proves it originally to be but in Nature of *Shack*, because of *Vicinage*; and therefore he may inclose and hold it in severally. And if a  
Man



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Man has an antient Close antiently taken out of such a Common Field, *ut supra*; and he, and all whose Estate he hath, have held the same in Severalty, he may claim to hold it still so. And as to that Parcel so inclosed the Shack retains its original Nature. And *per Coke*, He who claims Shack there may not prescribe to have Common in it. 7 Co. 6. See *Brook Tit. Common*, 35.

*Note*, In the Case of *The King v. Fox. Mich. 6 W. & M. in B. R.* 'tis admitted, That the Inhabitants of one Parish may have Common Appendant in Waste Grounds, which lie in another Parish, And in that Case, on the Question, Whether the Commoner should be assessed for Taxes in the Parish where the Waste lay, or in that where his Farm lay? it was held, He should be assessed, &c. in that where his Farm lay: For the Common is incident, and will not pass by the Grant of the Farm, &c. So that it is to be considered as a Part thereof, and the Farm is to be tax'd the higher. *Salk.* 169.

And tho' it be said in some of our Books, That Common cannot belong to a House or Cottage; yet in the Case of *Emerton ver. Selby, Hill. 2 Annæ*, it was held, That one may prescribe for Common Appendant to his Cottage; for a Cottage contains a Curtilage at least; and there is no Difference between a Curtilage and a Messuage, as to the Appendancy of Common; also a Cottage has at least a Courtyard belonging to it. And *Holt, Ch. Just.* said, He remembered the Trial of an Issue, whether Levant and Couchant, before *Hale, Ch. Just.* who held, That Foddering of Cattle

2 Saund. 251.  
Vaugh. 253.

in



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in the Yard was good Evidence of *Levancy* and *Couchancy*. 6 *Mod.* 144. *Salk.* 189. *Vide post.* 19, 20.

*Nota*, The Stat. called *Extenta Manerii*, 4 *Ed.* 1. says, A Cottage contains a Curtilage. And by the Stat. 31 *Elix.* *cb.* 7. A Cottage ought to have four Acres of Land, *Co. Lit.* 5. *b.* 2 *Inst.* 736. 1 *Bulst.* 50.

'Tis likewise said in *Vaugh.* 253. That in common Intent Cattle cannot be Levant, &c. upon a Messuage only. But in 2 *Brownl.* 201. 'tis held, That Beasts may well be said to be Levant and Couchant upon a House, *viz.* either upon a Curtilage belonging thereto, or upon the House itself, *viz.* as many as may be tied therein, or are usual to be maintain'd therein. But this seems to be of Common Appurtenant and not Appendant. And therefore see and note the Difference between Common Appendant and Common Appurtenant, in *Chap.* III.

Common of *Turbary* may not be appendant to Land, but to a House it may. 4 *Rep.* 37. For the Appendency is to follow the Nature of the Thing to which 'tis appendant.

A Parson may have Common Appendant to his Parsonage, out of the Lands of an Abbot *Goldb.* p. 4. 2 *Inst.* 86.

### The Sorts of Common Appendant.

*Qu.* 1 *Roll.* 379. For a Commoner may prescribe to have Common *per totum Annum*, &c.

Common Appendant may be either unlimited in the Time, as, *per totum Annum*, &c. or it may be limited to a Time, or upon Condition, as *quam diu* he shall pay so much, or *tam diu* he shall be demurrant upon the House,

House, to which the Common is appendant.

37 H. 6. 32. 17 Ed. 3. 26. 4 Co. 37.

Also Common Appendant may be to a Commoner in Arable Land, after the Corn sowed until it be resown; so for two Years after the Corn cut, and not for the third; so in a Meadow after the Grass is cut until *Candlemas*; so in Pasture, from the Feast of St. *Augustin* till *All-Saints*. So it may be to put his Beasts therein for any limited Time certain. *Vide* 7 Co. 5. 1 Rol. 397.

A Man may have Common Appendant for 30 Beasts in one Place, and also Common Appendant to the same Land in another Place for Part of the said Beasts; and so may take where he will. 17 Ed. 3. 34. *Vide* 1 Roll. Abr. 397. D.

*With what Beasts it shall be used and taken, and with what not.*

With Horses and Oxen to plough the Land.  
37 H. 6. 34. 10 Ed. 4. 10. b.

So for Cows and Sheep to compester the Land. It may not be used but with the Beasts, which are for manuring or compestering of the Land, (*viz.*) Antient Hide and Gain. It shall not be used with Goats or Geese, &c. And therefore Prescription to have Common for all manner of Beasts, is not good; because this comprehends Goats, Sheep and the like. But such is Common Appurtenant. And the Words *pro omnibus averiis* are understood *omnibus averiis communicabilibus*. 37 H. 6. 34. *Per* Cur.

Now

Common Appendant, *sans* Number, how.

Now Common Appendant may be limited to a certain Number of Beasts by Usage, tho' it is in its own Nature without Number, because it is to have sufficient Pasture for the Beasts; and the Common is measurable according to the Quality and Quantity of the Freehold, to which he claims to have this Common Appendant; *scilicet*, for all those which are *Levant* and *Couchant* upon the Land, to which the Common is Appendant, 17 Ed. 3. 27. 37 H. 6. 34. 10 Ed. 4. 10. b. 15 Ed. 4. 32. b.

And so is my Lord Coke in his Comment on the Stat. of *Merton*, *ch. 4*. Tho' Common Appendant be without a certain Number, as to have sufficient Pasture for Beasts; yet the Words in the Statute of *Merton*, *ch. 4*. *quantum pertinet ad Tenementa sua*, may be reduced to a Certainty, for *id certum est quod certum reddi potest*; and Common Appendant, be it certain or uncertain, is within the Statute of *Merton*. Vide of Appendant, *infra*. 2 Inst. p. 86.

Not with the Beasts of a stranger.

Regularly, this Commoner may not use the Common, but with his own proper Beasts; and he may not *agist* the Beasts of a Stranger; but if he hath any temporary or special Property in them he may: As suppose he has not any Beasts to manure his Land, he may hire other Beasts to manure it, and then he may use the Common with them, for hiring makes them in a manner his own Beasts: So if he take the Beasts of a Stranger to fold, and fold them accordingly, being *Levant* and *Couchant* upon the Land, he may use the Common with these Beasts; for he hath a special Property



perty in them for the Time. 11 H. 6. 22. b.  
Mich. 10 Car. in B. R. *Jason and Hellyard.*

It is agreed in *Rumsey's Case*, 2 Keb. 504.  
that a Man cannot put in the Beasts of a  
Stranger, but only to compestore his Land.  
2 Keb. 504.

Note, All manner of Beasts but Sheep and  
Earlings, are called *Magna Averia*. *Vide infra*, *Magna Averia*,  
what shall be said *magna Averia*: *Magna Ave-*  
*ria* may well be said Horses, Oxen, Kine,  
or other such Beasts of those Kinds which are  
commonable, and known as such by common  
Parlance of the People: Whether Sheep should  
be *magna Averia* was a doubt in *Stennell's*  
and *Hog's Case*. 2 Roll. Rep. 173. 1 Saunders,  
227. *Vide post.*

As for the pleading in Common Appendant.  
*Vide infra*; for it is a kind of Nicety, and (as  
may be observed from what has been said,) it  
is not necessary to be prescribed for; and  
yet it must be claimed Time out of Memory.

And as for Extinguishment or Apportion-  
ment of this Sort of Common, *vide infra sub*  
*Tit. Extinguishment & Apportionment.*

And see the Differences between Common  
Appendant and Appurtenant in the following  
Chapter.

## CHAP.



C H A P. III.

*Of Common Appurtenant. The Nature of it. The Diversities between Common Appendant, and Common Appurtenant. To what it shall be said Appurtenant, and how it shall be used, and with what Beasts.*

**C**OMMON Appurtenant is much of the Nature of Common Appendant, but it differs in several Particulars, also it differs in the Forms of Pleading. And it may be used not only with Beasts commonable, as Horses, Oxen, Kine and Sheep; but with Beasts not commonable, as Goats, Geese, Hogs: And the Judges favour this sort of Common Appurtenant, if it can any ways be made good; as in *Stone* and *Mussenden's* Case before cited, and other Cases hereafter, as may be observed.

Differences  
between  
Common Appendant and  
Appurtenant.

Now for the farther Illustration of Common, I shall shew in what Particulars Common Appendant and Appurtenant differ.

Though Common Appendant and Common Appurtenant are frequently confounded in our Books, and oftentimes mistaken the one for the other, yet it appears by what is before said, That they differ in their Kind, Nature, and Quality: But for a clearer distinction between them, observe the following Differences.

1. Common Appendant may not be created at this Day, nor can it arise within Time or Memory

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Memory, but must grow by long Usage and Prescription, Time out of Mind; but Common *Appurtenant* may be newly granted or created at this Day, though it may also arise by Usage, &c.

2. Common *Appendant* is only to be taken and claimed, for and by Reason of antient Arable Land only; but Common *Appurtenant* may be claimed and taken for or by Reason of a House or Cottage, or for any other Land, besides Arable, as Meadow, Pasture, &c.

3. Common *Appendant* can only be taken and claimed for such Cattle, as manure or compost, *i. e.* marl or dung the Land; but Common *Appurtenant* may be for all Manner of Beasts whatsoever.

4. Common *Appendant* is only to be taken with and claimed for so many Beasts or Cattle only as will serve to manure and compost the Land; but Common *Appurtenant* may be for Beasts *Sans Number*.

5. The *Appendant* must be claimed for and taken with the Beasts, only while they are *Demurrant*, *Levant* and *Couchant* upon the Land, to which it is *Appendant*; but Common *Appurtenant* may be claimed for and taken with Beasts that go and are kept in any Place whatsoever.

6. The *Appendant* must be taken within Measure, *i. e.* in Proportion to the Land to which 'tis *Appendant*. As if it be *Appendant* to one Acre, the Common shall be only for so many Beasts as will manure and dung that Acre; and if he take the Common with more Beasts, the rest of the Commoners may have a Writ of Admeasurement of Pasture to restrain him; but

but Common *Appurtenant* may be had and taken by Beasts *Sans Number*. And it seems no Writ of Admeasurement will lie in the Case of Common *Appurtenant*. *Vide* 8 Co. 70. 6 Co. 60. 4 Co. 38. 4 E. 4. 29. 15 E. 4. 32. 9 E. 4. 3.

7. Also Common *Appendant* cannot be severed from the Land to which it belongs, (either by any Act of God, or of the Law, or of the Parties, *ut dicitur*; (*sed Quære*) but Common *Appurtenant* may be severed from the House, Land, or other Thing to which 'tis *Appurtenant* (in many Cases.)

8. Yet Common *Appendant* may be extinguished by Unity of all the Land and the Common; and so it may by Division of the Land, &c. But for Common *Appurtenant* 'tis questionable. *Vide Moore*, Case 654.

9. But purchasing Part of the Land in which is Common *Appendant*, does not extinguish the Common; otherwise it is of Common *Appurtenant*. 1 *Brownl.* 180.

10. If one prescribes for Common, as *Appendant* to that which is against the Nature of Common *Appendant*, this shall not be Common *Appendant*, but rather *Appurtenant* or in *Gross*. *Bro Com.* 13.

11. And if these Words, *Common Appendant to the House or Tenement, &c.* be in a Grant, this will not create a Common *Appendant*, that was not *Appendant* before. 1 *Bulst.* 18. And if the Title to Common be made as *Appendant*, Time out of Mind, to a House, Meadow or Pasture, as well as Arable Land, this must be Common *Appurtenant* and not *Appendant*. 4 Co. 36.

12. If



12. If a Lord of a Manor, within which are divers Wastes, grants to another certain Lands within the Manor, and Common within the Wastes thereof, with all his Beasts, this is Common in Gross, and neither *Appendant* nor *Appurtenant*. But if it were set down with what Beasts in certain the Common should be taken, it were Common Appurtenant. *Per 3 Inst. in the Case of Stamford and Burges, B. R. Shp. Abr. Common 381.*

13. One prescribed to have Common appertaining to his House and Land, in the Land of *A.* and in the Land of *B.* and this was held to be Common Appurtenant, and not Appendant. *4 Co. 37. Goldsb. 114.*

14. So if a Man has Common of *Estovers* in a certain Place, Time out of Mind, to be burnt in his House, and to amend his old Houses and Hedges, this is not Common Appendant, but only Appurtenant. *11 H. 6. 11. 1 Rol. Abr. 399. L.*

15. Note, *Per Anderson* Chief Justice, There is no Common by common Right, but only Common Appendant. *Goldsb. 114.*

*To what it shall be Appurtenant.*

If a Man and his Ancestors, and all those whose Estate he hath in an House, have had Common for two Beasts in a certain Place; this is not Common Appendant, but Appurtenant. *11 H. 6. 12.* To an House.

If a Man grant Common to another for all his Beasts, which shall be *Lewant* and *Couchant* upon *Black Acre*, or which shall manure or depasture *Black Acre*; this is Common Appurtenant



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purtenant to Black Acre. *Vide postea. Plowd. Com. 381. a.*

It may be Appurtenant to Meadow, Pasture, &c. *Turringham's Case.*

So it may to a House, Cottage, Curtilage, &c. *Vide ante 14.*

*How Common Appurtenant shall be used, and with what Beasts.*

It may be used with Horses, Oxen, Cows, Sheep, Goats, Hogs, and all Beasts, at all Seasons of the Year, (That is,) according to the Usage or Grant; though Swine and Geese are not Commonable Beasts.

With Beasts  
Levant and  
Couchant.

The Reason  
why they must  
be Levant and  
Couchant.

Common Appurtenant is only for Beasts *Levant and Couchant*; and he which claims only Common Appurtenant to his Land, ought to say for his Beasts *Levant and Couchant*, or otherwise is not good; because that in such case he claims but Part of the Herbage, and the Residue the Lord is to have; and then the Commoner ought to say for his Beasts *Levant and Couchant*, for this is the Standard of the Profit he is to have, *viz.* Herbage for all his Beasts that shall be *Levant and Couchant* upon his Land, and not for any more; and therefore, if he put in any Beasts that are not *Levant and Couchant*, he does Wrong to the Lord, and shall be punish'd as a Trespassor for them. *2 Saund. 325, 326. Hoskins and Robbins's Case. Noy Rep. 145. Jeffreys and Boyes's Case.*

Prescription.

If a Man claim Common by Prescription for all Beasts Commonable, in the Land of another, as appertinent to a Tenement, this is a void

void Prescription; because he does not say it is for Beasts *Levant* and *Couchant* on the Land, to which he claims this to be Appurtenant; for a Man may not have Common, without Number, Appurtenant to Land: And when he claims the Common for all Beasts Commonable, and doth not say for Beasts *Levant* and *Couchant* upon the Tenement; this shall be intended to be Common *Sans Number*, according to the Words; for there is not any thing to limit it, when he doth not say for Beasts *Levant* and *Couchant*. *Pasc. 16 Car. in B. R. Cobham and White's Case.*

The Reason of the necessity of these Words, (*Levant and Couchant*) in the Prescription.

But where Common is claimed by the Name of Pasturage, there needs no Averment, that they were *Levant* and *Couchant*. *Vide infra tit. Prescription, Cro. Jac. 27. Sir J. Thorndle's Case.*

He which hath Common Appurtenant may not *agist* the Beasts of a Stranger; and he which claims Common for Beasts *Levant* and *Couchant*, may not give License to a Stranger to put in his Beasts, for that would be a Wrong to the Lord or Owner of the Soil by a Surcharger of Common: And *Monk and Butler's Case* is, where one who had Common for 20 Beasts certain, may not license another to put in the same Number; *a fortiori* where they have for no certain Number. *Cro. Jac. 574. Monk and Butler's Case.*

Not with the Beasts of a Stranger. License:

But he which hath Common Appurtenant may borrow or hire the Sheep of another to compest the Land, (but not to sell them) and may use this with his Beasts that are for his Stall. *14 H. 6. 6.*

The Plaintiff replies to justify Damage Feasant in Trespass by a Gelding, that he is seised

## The Law of Commons.

of a Messuage and Land in, &c. and that he and all those whose Estate, &c. have had Common *pro 25 magnis averiis* every Year after *May-day, &c.* This Plea is good, For *magna averia* may well be intended Horses, Oxen, Kine, or other such Beasts of those kind which are commonable, and such which by the common Phrase of the People are well enough known amongst them. *Cro. Jac. 580. Standred and Shoredich's Case.*

As for Common Appurtenant, the Prescription and manner of Pleading and Declaring, *Vide infra.*

And as for the Apportionment or Suspension thereof, *Vide infra.*

Upon a Special Verdict in Ejectment the Question was, Whether or not a Prescription for Common of Pasture, for all Cattle and Swine in a Forest at all times of the Year, were a good Prescription or not? The Prescription is naught. *Hard. p. 87.*

## C H A P. IV.

*Of Common in Gross. By Grant or Prescription. Common Sans Number. How and with what, and whose Beasts it may be used. The Commencement of Common in Gross, and how it may be made at this Day, and how it may be granted over.*

**C**ommon in Gross is, where I by my Deed grant to another, that he shall have Common in my Land: It is so called because it appertains to no Land, and must be by Writing

Writing or Prescription. *Vide Co. 2 Inst. 122.*  
477. *contra.*

I shall set down what shall be said Common in Gross, or not, in certain Cases.

If a Grant is for Beasts *Levant* and *Couchant*, this cannot be intended Common in Gross, but Appurtenant. Therefore, If *A.* grant Common to *B.* in certain Land for all his Beasts, which shall be *Levant* and *Couchant* upon *B. Acre*, where *B.* had nothing in *Black Acre*, so that this may not be Appurtenant; yet this shall not be a Common in Gross, because the Intention of the Grant is for Beasts *Levant* and *Couchant*. And so if *A.* grant to *B.* Common in certain Land for all his Beasts, which shall be manuring and depasturing in *B. Acre*, where *B.* had nothing in *B. Acre*, because this cannot take Effect as a Common Appurtenant, yet it shall not take Effect as a Common in Gross, inasmuch as it is limited to such Beasts as shall manure and depasture the Land. *Vide plus infra tit. Grant, 1 Roll's Abr. 403. Gawen and Stacy's Case.*

Intention of the Grant, a good Rule for Construction.

If a Man grant to another *quandam assartam cum communia Turbarie quantum pertinet ad duas bovatas terre cum pertinentiis in D.* This is a Common in Gross, being a Grant *de novo*, not by Prescription, nor Appurtenant to the said *Assart*, 5 *Aff. 9.*

Now observe with my Lord Coke upon *Litton* 122. Some Common is certain, *id est*, for a certain number of Beasts; some Common is certain by Consequence, (*viz.*) for such which are *Levant* and *Couchant* upon the Land; and some more uncertain, as Common without Number in Gross.

Diversities of Certainty as to Common.



Differences between Common in Gros, and Common without Number in Gros.

Yet *Note*. Though it is called Common in Gros and *Sans Number*; if you prescribe for Common without Number Appurtenant to Land, you can put in no more Cattle than what is proportionable to your Land; for the Land stints you in that case to a reasonable Number; but if you prescribe for Common without Number in Gros, there is no Bounds. But if the Owner grant Common *Sans Number*, yet the Grantee may not use the Common with so many Beasts as that the Grantor may not have sufficient for his Beasts.

Prescription for Common in Gros.

A Man may prescribe for Common in Gros, without saying *Levant* and *Couchant*; but not so for Common Appendant. For a Man cannot have Common without Number Appurtenant to Land, but Appendant. *Mod. Rep.* 74.

What shall be intended Common in Gros.

When a Man claims Common for all Beasts commonable, and does not say for Beasts *Levant* and *Couchant* upon the Tenement; this shall be intended to be Common without Number: And therefore, if a Man claim Common by Prescription for all Beasts commonable in the Land of another, as appertaining to his Tenement, this is a void Prescription, because it is not said, it is for Beasts *Levant* and *Couchant* in the Land to which he claims this to be Appurtenant; for a Man cannot have Common without Number, appurtenant to Land: And when he claims Common for all Beasts commonable, and saith not for Beasts *Levant* and *Couchant* upon the Tenement, this shall be intended to be Common without Number, according to the Words; for there is not

Prescription.

not any thing to limit it, when he does not say for Beasts *Levant* and *Couchant*. 1 *Roll's Abr.* 398. *Cobbay* and *White's* Case.

If a Man had Common *Sans Number*, yet he ought not so to surcharge the Soil, but that the Lord may have Common there also; and if the Tenant surcharge the Soil, where he had Common without Number, the Lord may distrain him, but Admeasurement lies not. 2 *Saund.* 345. *ibid.*

Common without Number cannot be Appendant to any thing but Lands; and it's called *Common Sans Number*, because it is only for Beasts *Levant* and *Couchant*; and it is uncertain how many those are, there being more in some Years than in other. But it's a Common in its Nature, for *id certum est quod certum reddi potest*. *Hard.* 118. *Chicbly's* Case.

As for the granting of Common in Gros and *Sans Number*, and how it shall pass, and with what Words. *Vide infra* tit. *Grant, and Exposition of Grants.*

*How, and with what, and whose Beasts it may be used.*

He which hath Common in Gros for a certain Number of Beasts, may put in the Beasts of a Stranger, and use the Common with them. 11 *H.* 6. 22. *b.* With the Beasts of a Stranger.

He may hire other Beasts to manure his Land, and use the Common with them; for they are in a manner his Beasts for the time; and I see no Reason, but he may agist other Beasts, though 45 *Ed.* 3. 25. seems to be against it.

## The Law of Commons.

For all manner of Beasts.

A Man may prescribe to have Common in Grofs for all manner of Beasts, or the Grantee may have it for a certain Number of Beasts.

*The Commencement of Common in Grofs, and how it may be made at this Day, or granted over or not.*

*Vide supra* in this Chapter, That it may commence either by Prescription or Grant. *Vide Cro. Car. 219.*

Common Appendant, and Common Appurtenant may not be made in Grofs, and the Reason.

Common Appendant may not be made Common in Grofs, for that is for Beasts *Levant* and *Couchant* upon the Land to which, &c. and therefore it may not be severed without Extinguishment. And Common Appurtenant for Beasts *Levant* and *Couchant* upon the Land may not be made in Grofs, for the Cause aforesaid; and if the Intention of the Grant is, that the Beasts shall be *Levant* and *Couchant*, it shall not be a Common in Grofs. 9 Ed. 4. 39. *Plowd. Com. Nevill's Case*, 384. *Pasc. 2 Jac. 13. Drury and Rant's Case.*

Grant over.

If *A.* and all those whose Estate he hath in the Manor of *D.* have had Time out of Memory a Fold-course, *scilicet*, Common of Pasture for any Number of Beasts not exceeding 300, in a certain Field Appurtenant to the said Manor; he may grant over this Fold-course to another, and so make it in Grofs; because the Common is for a Number certain, and by the Prescription the Sheep are not to be *Levant* and *Couchant* upon the Manor; but it is a Common for so many Sheep appertaining to the Manor, which may be severed from the

the Manor as well as an Advowson, without any Prejudice to the Owner of the Land where the Common is to be taken. *M. 11 Car. B. R. Day and Spooner's Case, in Cro. Car.*

*Vide pluis sub tit. Grant.*

C H A P. V.

*Of Common pur Cause de Vicinage. The Nature and Original of it. What shall be Common pur Cause de Vicinage, and what Persons shall have it, and how Title shall be made to it, and how used; of Enclosure of the Land, the Consequences thereof, and Pleadings therein, &c.*

**A**ND this is where Tenants of two Lords who are seised of two Vills, whereof one lies near to the other, and every of them have used, Time out of Mind, &c. to have Common in the Vill of the other with all Beasts commonable; as Horses, Oxen, Cows, Sheep.

The original Cause of this Common was not for Profit, but for preventing of Suits in the Champain Country, for reciprocal Escapes of Beasts, out of one Village or Manor into the other; therefore if in *A.* there are 50 Acres, and in *B.* there are 100 Acres, of Common adjoining, the Inhabitants of *A.* may not put in more Beasts than the 50 Acres will depasture, for they are to have Regard to the Freehold of the other; for this Common is only an Excuse for Trespas. 7 Rep. 5. Sir Miles Corbet's Case. Co. Lit. 122.

But



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One may inclose against the other.

But this Sort of Common differs from the other; for no Man can put his Beasts therein, but they must escape thither of themselves by reason of *Vicinity*, in which Case one may inclose against the other; because as it is said before, it is but an Excuse for Trespass: And so is *Dyer*, 316. One may not put their Beasts into the Land of the other, for then those of the other Vill may distrein them *Damage-feasant*, or have an Action of Trespass; but they ought to stray out of their own Fields. *Co. Lit.* 122. a. 8 *Rep.* 78, 79. *Wyat* and *Wild's* Case.

If one had Land in another Town, and common there with the Inhabitants, &c. this is Common by Cause of *Vicinage*, *Dyer* 47. *Pl.* 13.

But if there are 3 Vills, *A.* *B.* and *C.* and *B.* is in the middle between them; the Vills of *A.* and *C.* may not intercommon *per* Cause of *Vicinage*. *Dyer* 47. *Pl.* 14.

If there are two Manors in one Vill, they may intercommon for *Vicinage*; and this is usual. 2 *Bulst.* 87.

Not to be prescribed for.

Every Common for Cause of *Vicinage* is Common Appendant. And therefore, a Man need not prescribe in a Common for Cause of *Vicinage*; but it is sufficient to say, That he and all those whose Estate, &c. have used to intercommon by Cause of *Vicinage*. *Vid. infra.* And yet 13 *H.* 7. 13. b. a *Prescription pro Communicatione Vicenagii.* 1 *Roll. Abr.* 399. K. 6.

Of

Of Inclosure of the Land in which is Common  
pur Cause of Vicinage, and the Consequence.

One Town may inclose against the other;  
for this sort of Common is but an Excuse  
for Trespass. *Co. Lit.* 122. *1 Keb.* 24.

If the Lord inclose any part of his Com- By Inclosure  
mon, the Common for cause of Vicinage is the Common  
gone; for *cessante causa cessat effectus*. *1 Roll.* is gone.  
*Abr.* 399.

If there is Common for Cause of Vicinage But not as to a  
between two Manors, and the Lord of one Copyholder.  
Manor inclose; this shall not bind a Copy-  
holder of the same Manor, but that he may  
have Common for Cause of Vicinage, as he had  
before. *1 Roll. Abr.* 399. *K.* 2.

Pleadings of Common pur Cause de Vi-  
cinage.

The usual Form is, That he and all seised  
of those Lands, &c. have Common *ratione Vi-*  
*cinagii, ratione cuius, &c.* But the Defendant Need not be  
avowed in Replevin, Damage-fesant. The said Levant  
Plaintiff replied, That the *Locus in quo* adjoins and Couchant.  
to the Common to which the Plaintiff's  
Ground adjoined, and that the Cattle of the  
Defendant, put into his Grounds, have used  
Time out of, &c. to escape, &c. is good also,  
and they need not be said Cattle *Levant* and  
*Couchant* as in Title for Common; the Pre-  
scription for the Common is personal. *3 Keb.*  
*388. Smith and Baynard's Case.*

One prescribes, that all the Occupiers of Prescription.  
*B. &c. Habuere & habere consuevere* Common  
in

## The Law of Commons.

in such a Down in C. *ratione Vicinagii*. The Question is, If this be well pleaded without alledging, that it is Time out of Memory? And the Reporter saith it is not well pleaded, because Prescription is the Ground for Common of *Vicinage*; which I conceive is a Mistake. *Latch p. 161. Jenkins's Case.*

### Avowry.

**Ad** Defend' seistus de Mes. & terris habuit communia Pasture in Loco, &c. pro omnibus Vaccis Levan, &c. p tot an num. Et qd cepit averia daunū fac. 3 Brownl. pl. 299.

**Bar'**, **Ad** Quer' seistus de Mes. & terris habuit communia Pasture in terris adjacent Loco in quo, &c. sine censuris & in Loco in quo, &c. causa Vicinagii. Et similiter Defend' habuit communia in iisdem terris causa Vicinagii.

**Repl'** Per maintenance de avowry & traverse Prescription de Common causa Vicinagii.

### Trial.

It is no good Exception to a Witness, that he has Common *pur cause de Vicinage* in the Lands in Question; because it is but an Excuse of Trespass, and no Interest: So it is of *Shack Common*: *Trials per Pais 162. Clapham's Case. M. 1657. B. R.*

C H A P. VI.

Of Common of Estovers, by Prescription or Grant. How they shall be claim'd, and what Title to them shall be good, and what not. Whether, and to what Purposes Estovers continue upon falling down of, or new Additions of the Messuage. Grant of Estovers. Remedy for the Commoner. The manner of Declaring and Pleading in Actions of Estovers.

**T**HE word *Estovers* contains Hedg-bote, House-bote and Plough-bote; and the Grant of *rationabile Estoverium* comprehends all these: They may be appendant or appurtenant to an House by Prescription, or by Grant.

Observe, Bote in the Saxon Language, and *Estovers* in the French, are all of one Signification, viz. to have Compensation or Satisfaction for these Purposes, as House-bote is *Estoverium Edificandi & ardendi*, Plow-bote is *Estoverium arandi*, and Hay-bote is *Estoverium claudendi*, for Gates, Fences, &c. as a-

The several Sorts.

Vide Chap. I.

foresaid; and these *Estovers* must be reasonable; and these the Lessee may take upon the Land without any Assignment, unless he be restrained by special Covenant. And all these the Law gives to Tenant for Life, without Provision of the Party; and the same *Estovers* Tenant for Life may have, Tenant for Years shall have. A Man may prescribe to have Common of *Estovers* to his House, but he cannot

What *Estovers* of common Right belong to Tenant for Life or Years.



cannot prescribe to sell the Wood. 1 *Inst.* 41. 6. 1 *Roll. Abr.* 401. 11 *H.* 6. 11. b.

Prescription  
for *Estovers* to  
build new  
Houses.

Prescription for *Estovers* to repair or build new Houses, is good ; and therefore in Trespas for cutting down of Trees, &c. the Defendant justifies by Prescription to have *Estovers* ; for that he was seised in Fee of such an House and Land, and prescribed to have *Estovers* for repairing the said Houses, or for the building of new on the said Land, and justifies, &c. *Per Cur' præter Williams*, it was held good ; for one may grant such *Estovers* at this Day, and by the same Reason there may be a Prescription for them. But by *Williams*, It ought to be reasonable, which is to repair ancient Houses, but not to build new ones, for then he may cut down all the Wood and destroy it, which seems to be a good Reason. But it was adjudged against his Opinion. *Cro. Jac.* 25. Countess of *Arundel* against *Steele*.

*Estovers* reason-  
able.  
Diversity.

There is a remarkable Diversity in *Douglas* and *Kendal's* Case, reported and agreed by several Reporters. It is where a Man claims reasonable *Estovers* in another's Soil, and where he claims all the Thorns or Trees in another's Soil ; in the first Case, if the Owner of the Soil cut down all the Thorns first, he who had Common of *Estovers* cannot take them, for the Property and Interest of all the Thorns continues in the Owner of the Soil, and the other had nothing but Common there ; and in such Case, he who had Title of *Estovers* shall have an Action on the Case ; *aliter*, where a Man claims *omnes spinas* ; there the Lord may not cut down Thorns, nor licence any other

Action on the  
Case.

other to cut them down, because the Defendant prescribes to have all the Thorns growing on that Place; and this Prescription excluded the Lord to take any Thorns there. *Yelv.*

187. *Cro. Jac.* 25. 1 *Bulst.* 94. 1 *Brownl.*

219. *Dowglas and Kendal's Case.*

If a Man grant to Lessee for Years, that he shall have so many *Estovers* as shall serve to repair his House, or that he shall burn within his House, &c. during the Term; this is appurtenant to the Land, and shall run with it as appurtenant to the Land into whose Hands soever it shall come. 5 *Rep.* 17. in *Spencer's Case*, cited in Dean and Chapter of *Windsor's Case*.

So in *Plowden* 381. If one grant *Estovers* to another, to be burnt in such an House, it is appurtenant to the House, and is inseparably incident to it. And so Common granted in such a Place to one for his Beasts *Levant* and *Couchant* in his Farm of *Dale*, the Common is made appurtenant to this: So that he who had the House, by whatsoever Title he comes to it after, he shall have the *Estovers*; and he who after shall come to the Farm shall have Common; and the *Estovers* may not be severed from the House, nor the Common from the Farm, unless by Extinction; for if he who hath the House will grant the *Estovers* to another, reserving to him the House, or the House to another, reserving to him the *Estovers*, the *Estovers* shall not be separated from the House by this, because they are to be expended in the same House. *Plowd.* 381. *Sir Henry Nevill's Case.*

*Estovers Appurtenant.*  
Grant.

The Nature of Common Appurtenant.

*Estovers not to be separated.*

## The Law of Commons.

If the Lessor grant Fire-bote expressly in his Lease, the Lessee may take Trees if there be no Under-wood. 3 Leon, 16.

Grant of Estovers.

The Bishop of *Litchfield* and *Coventry* granted to King *Edward VI.* the Woodwardship of the Forest of *C.* and *Estovers pro easiamento dicti Edwardi & hered' suorum*, by Assignment of the Officers of the said Forest; and if the Assignment be not made within 10 Days after Request, that then King *Edward* and his Heirs should cut down Wood where they pleased. *Per. Cur.* No Inheritance in the Things granted passed to King *Edward*, but only an Interest for his own Life, the Grant being to him without the word Heirs, and the Clause of Default in the Assignment, that it shall be lawful for the said King *Edward* and his Heirs, shall not supply the Defect of the Words in the Grant. 1 Leon. p. 2. The Lord *Paget* and *Sir Walter Ashton's Case*.

A Lease is made of a House and Wood wherein 'tis covenanted, *That the Lessee shall have House-bote and Fire-bote*; by this 'tis implied and meant, That he shall not have any of the Woods to use or convert to any other Purpose, but that they do belong to the Lessor; and if the Lessee uses them to any other Purpose, the Lessor shall have help in Chancery, and he may cut the Woods, leaving to the Lessee sufficient for House-bote and Fire-boot. *T. L. 50.*

Whether

*Whether Estovers continue, if the Messuage be altered by new Additions, or fallen down.*

If a Man had *Estovers*, either by Grant or Prescription to his House, he may alter the Rooms, and not destroy his Prescription. So if he make new Additions to the old House, and build new Chimneys, provided he build none of the Chimneys on the Part newly added.

4 Rep. *Lutterell's Case*.

So, If an House happen to decay, a new one may be erected on the same Place, and not destroy the *Estovers* appertaining thereto; and Common of *Estovers* appendant to an House, is not lost by the falling down of the House, but revived by the Re-edifying; in *Brier and Lakes's Case*. 4 Hob. 39, 40.

*Estovers revived by Re-edifying.*

If an ancient Cottage is erected in the Place where the old Cottage stood; this is no new Cottage, but it may claim Common as an ancient Cottage by Prescription. But yet, when the House is down he can claim no *Estovers*; and if he sue for it, and the other plead, that his House is down, he shall not have Judgment with a *cesset executio*, till his House be re-edified; for at the Time of Action brought he has no Right of *Estovers*, but it is in Suspence; therefore it is not a perpetual, but a temporary Bar: And if he re-edifie his House, he shall have his *Estovers* again. *Style* p. 446. Hob. 43. in *Cooper and Andrews's Case*.

*Suspended by the falling down of the House.*

*Quære*, If in such Case he bring an *Affize*, or a *Quod permittat*, and Judgment passeth against him, if he be not barred finally?



Not by grubbing up the Wood.

Common of *Estovers* is not lost by grubbing up the Wood; but still an Assize will lie. *Hob. 43. Dyer 363.*

The Wood not to be converted to other Uses.

*A.* has Common of *Estovers* in the Wood of *B.* (*scilicet*) for House-boot, and he cuts down four Trees to repair, and in the working they prove unfit for that Use; as for Posts of an House, &c. The Tenant cannot convert this Timber to any other Use, as to Cooper-Ware, &c. neither can they sell them and buy other fit Wood with the Money; neither can he enlarge the House with this Timber, nor board the Sides of a Barn therewith, which had Mud-walls, or the like, before. *Per Berkley at York Assizes. Clayt. Rep. 47. Earl of Pembroke's Case.*

Also 'tis said, If one have *Estovers* in certain in 10 Acres of Wood, and five of those Acres descend to him, he shall have the whole *Estovers* out of the Residue. *Vide Critica Juris ingeniosa. p. 123.*

#### Remedy.

Action on the Case against Owner of the Soil, if he cut down all the Trees.

Where a Man claims Common of *Estovers* in another's Soil, if the Owner of the Soil cuts down all the Thorns or Trees first, he who had Common of *Estovers* cannot take them away; for the Property and Interest of all the Thorns continues in the Owner of the Soil, and the other had nothing but the Common there. But he who had Common there in such a Case, shall have an Action on the Case. *Vide supra. Telv. 187. Cro. Jac. 256. Dowglass and Kendall's Case.*

If the Commoner had an Estate for Life he shall have an Assize; if but a Term for Years, he shall have Action on the Case. So  
Action

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Action on the Case lies by a Tenant for Years of an House, to which *Estovers* are appurtenant, or to take Brakes. 1 *Roll. Abr.* 406. *Spilman's Case.* 9 *Rep.* 112. *b.*

A Man has Common of *Estovers*, so many Loads *per Annum* certain, or incertain so many as he shall spend in his House; If I stub up this Wood, so as there neither is, nor will be Wood again; yet he shall have an Affize from Year to Year; And Judgment shall be to recover Seisin and Damages. 9 *Rep.* 112. *b.* *Hob. p.* 43.

Affize lies, tho the Wood be grubbed up, and the Judgment in it.

The Statute of 22 *Ed.* 4. and 35 *H.* 8. *ch.* 7. which gives Power to Subjects to inclose Woods; yet the Commoner shall have Common. *Vide the Stat. of* 35 *H.* 8. *ch.* 17. 8 *Rep.* Sir Francis Barrington's Case.

Commoner shall have Common, notwithstanding Inclosure of Woods.

If I have *Estovers* in Land, and cut down the *Estovers*, and a Stranger takes them away; I shall have an Action against him, tho' he has Common of *Estovers* there also. 1 *Brownl.* 44.

An Action against a Stranger.

If a Lease be made of an House and *Estovers*, if the Lessor destroy all the Wood, out of which the *Estovers* are to be taken, the Lessee shall have an Action against the Lessor. 1 *Saund.* 322.

Action of Covenant against the Lessor.

### Declarations and Pleadings as to *Estovers*.

To this Purpose is a good Case, 3 *Leon.* p. 218. *Russell and Brock's Case.*

Trespass for cutting down 4 Oaks. The Defendant pleaded. That the Place where, &c. and that he is seised of a Messuage in *D.* and that he, and all those whose Estate he

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hath, &c. *habere consueverunt rationabile Estoverium suum*, for Fuel, *ad Libitum suum capiend. in boscis subboscis & arboribus ibidem crescentibus*, and that in *Quolibet tempore Anni*, except Fawning Time: The Plaintiff replies, That the Place where, &c, is the Forest of D. and that the Defendant, and all those whose Estate, &c. *habere consueverunt rationabile Estoverium de boscis, &c. per liberationem Forestarii aut ejus deputat. prout boscus pati potuit & non ad exigentiam petentis*. The Defendant demurs, and Judgment *versus Quer.* For if he would have ousted the Defendant of his Prescription, by the Law of the Forest, he ought to have shewed the Law of the Forest in such a Case, *Lex Forestæ talis est*; for the Law of the Forest is not the Common Law of the Land; and it ought to be pleaded; or else the Plaintiff ought to have traversed the Prescription of the Defendant; for here are two Prescriptions; one pleaded by the Defendant by way of Bar, the other set forth by the Plaintiff in his Replication, without any Traverse of that which is set forth in the Bar, which cannot be good: But if the Plaintiff had shewed in his Replication *Lex Forestæ talis est*, then the Prescription of the Defendant had been answered without any more; for no Man can prescribe against a Statute.

The Law of the Forest to be shewn in Pleading.

Prescription Traversed.

None can prescribe against a Statute regularly.

Two Exceptions were taken to the Bar. 1<sup>st</sup>. Because the Defendant hath justified the cutting down of Oaks, without alledging that there was not any Underwood. *Sed non allocatur*; for he hath his Choice, *ad libitum suum*. 2<sup>dly</sup>, Because he has not shewed, that at the Time

Time of the cutting, it was not Fawning-Time; for at the Fawning Time his Prescription doth not extend to it. This indeed is a material Exception: But because the Plaintiff had replied, and upon his Replication the Defendant had demurred, the Court would not resort to the Bar, but gave Judgment on the Replication, and awarded *Nil cap. per breve.* *Quære.* After Demurrer to the Replication, the Court will not resort to the Imperfection of the Bar.

C H A P. VII.

Of Common of Turbary and Fishery.

*The Nature of Common of Turbary, and how Title shall be made to it. And the Remedy. Of Common of Fishery, the Nature thereof, and of Prescription therein, &c.*

Common of Turbary is of the same Nature To what it of *Estovers arдени*; and may not be appendant to Land, but to an House; for the shall be Appendant. Appendancy must follow the Nature of the Thing to which it is appendant. 4 Rep. 37. a. *Tirringham's Case.* 5 Aff. 9.

Prescription to have Turfs *tanquam ad Mesuagium pertin.* without saying they were to be burnt, is ill, especially on Demurrer. And In Pleading, it must be alleged, that they are to be burnt in the therefore in Trespass, for entring and digging his Land; the Defendant pleads, he is seised of an ancient Mesuage in *D. & omnes qui, &c.* House. have had 14 Days Delf of Turf, such as two Men can dig in the Place where, *tanquam ad Mesuagium pertin.* The Bar is ill, because he saith not they were to be burnt in the House; and so *non constat* whether the Turbary be in



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Gross or Appurtenant. One may prescribe to have two Loads of Wood out of another Man's Land, as in Gross ; but not as Appendant without Application, and annex'd to the Land, or House, in Property and Interest. *Siderfin*, 354. 1 *Lev.* 231. *Hayward* and *Cannington's* Case. 2 *Keb.* 290, 312. the same Case.

Note, Where Turbary is granted to a House, it shall pass by a Grant of the House, cum pertinentiis: See for this, the Case of *Solme vers. Bullock, Hill.* 31, 32 *Car.* 2. in C. B. where Trespass was brought for digging Turves in his Soil, The Defendant justifies by a Grant of the former Lord of the Manor to J. S. for digging Turves there, to J. S. and his Heirs, to be burnt in such a House, and shews, That J. S. granted the House cum pertinentiis to the Defendant and his Heirs ; and on long and special Pleadings, the Question was, Whether the Turbary should pass by the Words cum pertinentiis, without being specially named? And 2 *Cro.* 179, 180. *Brandly vers. Brook* was cited that it should not pass. But held by the whole Court, That it did pass ; For as Common Appurtenant may at this Day be granted, so it may pass by the word Appurtenances, either to House or Land, according as the Nature of the Thing is. *Vide* 3 *Lev.* 165.

Affize lies of Common of Turbary by the Statute of *W. 2. ch. 25.* 8 *Rep.* 48. *Jehu Web's* Case.

Of all Profits Appreder in certo loco, as *Estovers, Turbary, &c.* the Writ shall be *de Libero Tenemento.* The Writ shall be general, and Count special ; and Judgment shall be, that he

The Writ.  
The Count.

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he shall have it severally. 8 Rep. 47. b. 8 Rep. 50. *John Web's Case.*

### Common of Fischary.

*Prescription to have Common of Fischary, and where. And what shall be good, or not.*

A Man may prescribe to have *separalem* The Nature of it. *Pischariam* in such a Water, and exclude the Lord: But a Man may not prescribe to have Common of *Pischary*, or *Liberam Pischariam* in such a Water, and exclude the Owner of the Soil; for this is against the Nature of a Common of *Libera Pischaria*. 1 Inst. 122. *Shirland and White's Case.* 8 Rep. 98.

In Trespass *quare clausum fregit*, the Defendant justified, because he said he had a Right to Fishing there by Prescription: But he sets not forth what kind of Fishing he claimed, (*viz.*) whether *Liberam*, *separalem* or *communiam piscationis*, nor whether he had it as Appurtenant to a Messuage, Manor, &c. but makes it to be a mere personal Thing. *Per Cur.* It is ill. An Easement may be so claimed (as a Way, &c.) without saying to what it appertains; but a Common, which is an Interest, cannot, *Hardress*, p. 407.

If a Man claim Common, he must alledge to what it appertains, *aliter* of an Easement. Several Sorts of Fishery.

## C H A P. VIII.

*Of the Powers and Privileges of Commoners.*

1. *In Respect to the Common or Soil.* 2. *In Reference to the Lord.* 3. *In Reference to Strangers.* Of their Remedies by Actions on the Case, Distress, Trespass. Of Agistment and Licence. Where and in what Cases a Commoner may distrain Damage-Feasant, or not.

**A**S to what things a Commoner may do or not do, I shall consider it. 1. in Reference to the Common and Soil it self. 2. In Respect of other Commoners. 3. In Respect of the Lord of the Soil. 4. And in Respect to a Stranger; and then what he may do in case of Disturbance.

The Nature  
of Common,  
and the Con-  
sequence.

He may Di-  
strain Damage-  
Feasant.

As to what he may do in Reference to the Common and his Fellow-Commoners, you must remember, what I treated of before concerning the Nature of Common, and what Interest he hath in the Soil; which is no more but to put in his Cattle; neither is it properly his Common till his Beasts have fed there; and though he hath Common there, yet he cannot meddle with the Land, nor with the Grass, other than with the Feeding of the Cattle, for he hath but a feigned or relative Interest; That is, Though he hath no Interest in the Soil, yet he hath Interest in the Profit of it; and therefore he may distrain Beasts Damage-Feasant, because that is a Damage to the Commoner; or have his Action on the Case. 2 Leon. 201. 14 H. 8. 10. 4 H. 7. 3. 15 H. 7. 15.

A Com-

A Commoner may not do any thing upon the Soil, which tends to the Melioration or Improvement of the Common; as cutting down of Bushes, Fern, &c. And therefore, if a Common be every Year in the Winter surrounded with Water, the Commoner may not make a Trench in the Soil to avoid the Water; for he has nothing to do with the Soil, but only to take the Feed with the Mouths of his Cattle. And so was it adjudged in *Howard and Spencer's Case*. 17 Car. 2. B. R. May not alter the Soil, tho' it be to the Melioration of the Common.

A Commoner may not cut Mole-hills or Bushes, nor make Fishponds, though these Acts are for Improvement. But perhaps, if Commoners have used to dig and scowre Trenches Time out of Mind, then they may do it, as is used in the Moors of *Somerset*: Otherwise, if he fill a Trench in the Common which was dug by the Lord, the Lord shall have Trespass against him. 12 H. 8. 2. 13 H. 8. 15. *Siderf.* 251. 10 H. 7. 15.

There is a Difference, where the Commoner intermeddles with the Soil *de novo*, and where he reforms a Misfeafance; he may do the last but not the first; and it's said in *Godbolt's Rep.* p. 182. That it was holden by the whole Court, That the Commoner cannot generally justify the cutting and taking away Bushes off from the Common, but by a Special Prescription he may justify the same: So he may say, That the Commoners have used Time out of Mind to dig the Land to let out the Water, that he may the better take the Common with his Cattle. 2 Bulst. 116. *Godb.* 182. Yet he may reform a Misfeafance.

The Commoner may throw down a Gate or an Hedge, which hinders him from coming to his Common. A Com-



Come upon  
the Land to  
view the Pa-  
sture.

A Commoner may justifie his coming upon the Land, to view if the Pasture in it be fit to receive his Beasts. *Pl. 17. Jac. B. Spilman's Case.*

May eat the  
Corn.

If a Tenant of the Freehold ploughs it, and sows it with Corn, the Commoner may put in his Cattle, and therewith eat the Corn growing upon the Land: So if he lets his Corn lie in the Field beyond the Time usual, the other Commoners may notwithstanding put in their Beasts. *2 Leon. 202, 203.*

He may break  
open Inclo-  
sures.

Every Commoner may break the Common if it be enclosed, although he does not put in his Cattle immediately, and his Title of Common shall excuse him of Trespass. *Lit. Rep. 38. Hambleton's Case.*

*What Acts or Things a Commoner may do, or not do, in Reference to the Lord.*

Action on the  
Case for Sur-  
charging.

If the Lord surcharge the Common, the Commoner may not chase the Beasts; but shall have an Action on the Case, which is a sufficient Remedy. But the Beasts of a Stranger he may distrain Damage-Feasant, or chase them out of the Common; for a Stranger had no Colour to have his Beasts there. *Godb. 182.*

Surcharge.

If the Lord surcharge the Common with Conies, the Commoner in Trespass cannot justifie his Entry, to chase and kill them; for a Commoner cannot be his own Judge, for he has his Action on the Case: And though the Owner of the Soil had no Property in the Conies, yet so long as they are on his Land he has Possession of them, which is good against the Commoner. *Yelv. 104. 2 Leon. 201, 202.*

*Hodesdon*

*Hodesdon* and *Gysel's Case*. 1 *Brownl.* 208.  
the same Case. *Cro. Jac.* 195. the same Case.  
*Bridg.* 10. *Samson* and *Harrilo*.

If the Lord surcharge the Common, the Commoner shall have an Affize, or Action on the Case, not Admeasurement. *Fit.* 125. a.

If the Lord make a Pond on the Common, if the Commoner have Common sufficient left, it's good: But if all the Common be taken up in a Pond, he may let out the Water, and so enjoy the Common. 2 *Bulst.* 116.  
*Carill* and *Pack's Case*.

Action on the Case by a Commoner for eating up his Common. *Per Cur'*, The Tenants of a Manor may prescribe to have the sole Common for their Horses in a Meadow after the Grass is cut and made into Grass-cocks, to bind or keep their Horses there, so that they do not meddle with the Hay till *Lammas day*, and after *Lammas day* for all commonable Beasts, *Levant* and *Couchant* upon their Tenements at large, without tying, till *Lady-day* in Lent yearly, as to their Tenement appertaining, excluding the Lord of the Meadow and Manor, to have any Common or Pasture there for this Time, he having the Soil of the Meadow the whole Year, and the sole Herbage until *Lammas*, or Share until the cutting, if he will keep it for Hay. 2 *Roll's Abr.* 267. *Wheatland* and *Sir Robert Pain's Case*.

The Lord may be stinted in his own Soil, and then if the Lord put in more, the Commoner may distrain them Damage-Feasant. The Case was, *Trespas de clauso fracto*, The Defendant justifies taking the Beasts as Damage-Feasant, upon surmising a Custom, that the Plaintiff

*Distrain the Beasts of the Lord Damage-Feasant, on a Surcharge.*

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Where the Plaintiff must demur, if he will take Advantage.

The Lord may be stinted.

Distress.

Plaintiff being Lord had the Place in which, &c. intirely to himself till *Lammas-day*; and that afterwards it is common for the Tenants, so as the Plaintiff can put in three Horses only; and because he put in more than three Horses he took them Damage-Feasant. *Per Cur'*, The Matter of the taking the Beasts Damage-Feasant shall not come in Question, because nothing is in Issue but the Custom, and that was tried against the Plaintiff; but if the Plaintiff would have taken Advantage of this, he ought to have demurred; and although he had by this confessed the Custom, yet whether the Commoner might take the Beasts of the Lord Damage-Feasant, had then properly come in Debate. And by *Fenner, Williams and Crook*, Such taking is good: For by the Custom the Lord is excluded to have but his Stint, and the Lord may be well stinted, and all the Vesture and Benefit of the Soil is to the Commoners, and they have no other Remedy. But by all the Justices, Had the Custom been to distrain the Lord's Beasts, it had been good: Though it was urged on the other side, That the Defendant is but a Commoner, and it appears that the Place where, &c. is the Soil of the Plaintiff, and his Beasts cannot be taken Damage-Feasant on his own Soil. *Cro. Jac. 208. Yelv. 129. Kenrick and Pargeter's Case, 2 Brownl. 60. 6 Jac.*

But in *Trulock's Case*, 14 Car. this Case was adjudged; which was, There was a Custom, that a Close ought to lie fresh and hain every second Year until *Lady-day*, after the Corn cut and carried away, and J. S. had used Time out of Memory to have Common in the

the said Close, after *Lady-day* till it was re-sown with Corn, for his Beasts *Levant* and *Couchant* upon a certain Tenement, as Appurtenant to it; in this Case, if the Lord of the Soil of the said Close put in his Beasts into the said Close against the Custom, when it ought to lie fresh and hain by the Custom, *J. S.* though he be but a Commoner, may take the Beasts of the Lord Damage-Feasant; for it would be the worse for the Common, if the Lord should feed the Grass before the Common is to be taken. 1 *Roll's Abr.* 405, 406. *Trulock and White's Case.*

If the Owner of the Soil ploweth the Land, Commoner and sow the Land; yet the Commoner may put in his Cattle, claiming the Common; and he may well justify the same, because the Wrong begins in the Owner of the Soil. *may eat up the Lord's Corn.*  
2 *Leon.* 201.

One grants Common in such a place where, *Or Hay in a* *&c.* by this the Grantee may use all the Com- Stack on the mon; and if the Grantor erect a Stack of Hay Common. upon Part of the Place where, *&c.* and the Commoners Beasts eat the Hay, it's justifiable, and the Grantor cannot chase the Beasts. Therefore in Trespass, for chasing his Beasts, the Defendant justifies *pur* Damage-Feasant. The Plaintiff Replies, and justifies; for the Beasts may range over all the Place, and the Tort began first in the Grantor; otherwise, by such means he may defeat his own Grant; No man can and by the same Reason that he may erect one defeat his own Stack, he may erect twenty 20 *Yelv. p.* 201. Grant.  
*Fermor and Hunt's Case.* 1 *Bulst.* 220. same Case.

The Lord may not dig Pits in the Common; An Action on for the Statute saith, other Manner of Im- the Case for provement, digging of Pits.



## The Law of Commons.

provement, (*viz.*) by Inclosure. And a Commoner may bring an Action on the Case; as this was, for digging of Pits and spreading of Gravel, by which he lost his Common. The Defendant pleaded, He is Lord of the Soil, and that he digged for Coals, making as little Damage to the Pasture as might be, and averring that he had left sufficient Common. And the Plaintiff demurs, and shews for Cause, that this Plea amounts to the General Issue. And of that Opinion was the Court. 2 Cro. 165. 1 Sid. p. 106. *Goe and Cotter's Case.*

Plea amount-  
ing to the Ge-  
neral Issue.

*What things a Commoner may do, or not do, in  
Reference to an Estranger.*

Distrain Da-  
mage-Feasant.

An Action on  
the Case by  
every Com-  
moner.

The Commoner may distrain the Cattle of a Stranger Damage-Feasant in his own Name; for the Damage is to the Commoner. But he cannot distrain the Beasts of the Tenant of the Land Damage-Feasant. If any Man feed in a Common wrongfully, every Commoner may have an Action on the Case against him; if the Commoner hath a Freehold, he shall have an Assize; so if he has *Esfovers*, if a Stranger cut them, he shall have Assize; and if he has a Term, he shall have an Action on the Case. But a Commoner shall not have an Action for every small Trespass, but for such whereby he had lost his Common; but the Lord shall have an Action for every Trespass. The Commoner's Cause of Action must be *per quod proficuum suum amisit*. And the Tenant of the Soil may have an Action of Trespass though it be small. 15 H. 7. 2. 12. 9 Rep. 113. *Maoy's Case.* Hob. 43. Fitz. N. B. 58.

Copy-

Copyholder prescribes to have Common in the Waste of the Lord, and brings Trespass on the Case against a Stranger, for his Beasts depasturing on the Common there. The Question was, Whether this Action lies? For in 15 H. 7. 112. it's agreed, That a Commoner cannot maintain an Action of Trespass; nor no other, but the Owner of the Soil. 12 H. 8. 2. And the Commoner has no Right till he has taken it by the Mouths of his Beasts; and the Damage is to the Tenant of the Land, and then every other Commoner may have an Action, and so the Stranger shall be infinitely prejudiced. *Per Coke*, If a Commoner may distrain Damage-Feasant (doing Damage) it proves that he has Wrong; then by the same Reason, if the Beasts are gone before his coming, he may have an Action on the Case; otherwise, one that has many Beasts may destroy the Common in a Night; and it is not like a Nuisance, which may be punished in a Leet; But the other is private to the Commoner, and cannot be punished in another Course. And he cited one *Whiteband's Case*: Many Copyholders prescribed to have the Loppings and Toppings of Pollards, the Lord cuts them; every Copyholder may have his Action: And also *Hill. 5 Jac. Rot. 1427. George England's Case*. And *Warburton* was of the same Opinion. 2 *Brownl. p. 146. Crogate and Worms's Case*.

An Action on the Case, for Beasts Depasturing on the Common by every Commoner.

Copyholder useth to have Common, and an Estranger enters and take Turfs; although the Copyholder had not Damage by this, yet if the Declaration be, that he entred with Horses and Carts, and so impaired the Common, How the Copyholders shall have an Action for taking away of Turfs off the Common.

Narr.

mon, an Action on the Case lies. He declared, That the Defendant dug so many Turfs there, and then with his Horses and Carts, *Herbam tunc & ibidem crescentem pedibus ambulando & conculcando*, from the place aforesaid minus rite ceperit & abcarriavit per q'd querens Communiam suam prædictam pro Averiis prædictis, &c. in tam amplo & benefical' modo prout præantea habuit, &c. Habere non potuit. This is a good Declaration. Though the Commoner cannot have an Action for taking and carrying away the Turfs; yet his coming upon the Land with his Horses and Carts to carry them is a Prejudice to his Common, by which his Common is impaired, which is the Cause of Action; and the taking and carrying them away is a means to empair it. 1 Rolle's Abr. 89. Mich. 9 Car. in B. R. Terry and Goodyer's Case.

A Commoner cannot have an Action of Trespass, but he may distrain Damage-Feasant, and why.

Though the Commoner cannot have an Action of Trespass, by which he broke his Soil, for that belongs to the Owner of the Soil; yet distrain Damage-Feasant he may, as aforesaid: And the Reason is because he has received Damage, and Amends may be tendred to him in Recompence of his Damage, *Vide Pluin Tit. Remedy*, 2 Rolle's Abr. 552. 9.

Agistment.

A Commoner may not agist the Cattel of a Stranger, *Vide Tit. Common in Gross*. He which has Common in Gross for a certain Number of Beasts, may put in the Beasts of a Stranger, and use the Common with them. 2 Leon. p. 202. 11 H. 6. 22. b.

If a Man claim Common *sans nombre*, or to have Common for 20 Beasts, there he may agist other Beasts for Money, in the Common.

Grantee

Grantee for a certain Number may not common with the Beasts of a Stranger. *Fitzb. N. B. 180. b. 18 Ed. 4. 14. b.*

It was a doubt in *Monk and Butler's Case*, Whether one who has Commoning for 20 Beasts by Grant, can license another to feed there with such a Number of Beasts; because it is for a certain Number, and is as Pasture, and not Common, which ought to be taken by the Mouths of the Beasts of the Commoner? But they all agreed, That if he might license, yet he cannot do it *sans Deed*. And so is *Rumsey and Rawson's Case*, *Raym. 171.* A Commoner cannot license without Deed. In Replevin the Defendant avows as a Commoner, for taking Goods Damage-Feasant in *2 Lev. 2. 2 Saund 324, Loco in quo, &c.* The Plaintiff pleads in Bar *325.* of the said Avowry, That the Parson of D. is seised of such Glebe-Land, and that he had Common in *Loco in quo, &c.* for 200 Sheep *Levant* and *Couchant* upon the same Glebe-Land: And that the Plaintiff by the License of the said Parson put in his Cattle; and Issue is taken upon the *Levant* and *Couchant*, and found *pro Quer'*. It was moved in Arrest of Judgment for the Avowant, because License cannot be given by a Commoner, to put in the Cattle of a Stranger, and such License cannot be without Deed. But one may justify to hunt, &c. in the Soil of the Plaintiff himself by License without Deed. *Cro. Jac. 574. Monk and Butler's Case.*

If the Commoner hire other Beasts to manure his Land, he may use the Common with them; for they are in a manner his Beasts by the Hiring, and the Beasts which manure the Land, of Right ought to have Common. *Hiring.*

*45 Ed. 3. 25. 22 Aff. 84.*

F

If



Where a  
Commoner  
may kill Co-  
nies, or not.

If J. S. had Land adjoining to the Land of J. D. in which Land J. N. had Common of Pasture, and J. S. makes Cony-burrows in his Land, and stores them with Conies, which come into the Land of J. D. yet J. N. who had Common of Pasture may not kill them; because he had nothing to do but to take the Grass with the Mouth of his Cattel: And in *Eversley* and *Wilkinson's Case*, such a Commoner cannot have an Action on the Case against J. S. who had stored the Land with Conies, without lawful Grant or Prescription, whereby the Conies came into the Lands wherein he had Common, by which he lost his Common, because the Commoner may not kill the Conies. 1 *Roll. Abr.* 405. *Bellew* and *Langden*, and *Eversley* and *Wilkinson's Case*.

*Where a Commoner may distrain or not.*

A Commoner may justify the taking of the Beasts of a Stranger, Damage-Feasant upon the Land. 3 *Ed.* 3. 27. 15 *H.* 7. 11.

In an Action on the Case, for putting of Cattle upon the Common; it was adjudged, That if the Cattle of a Stranger escape into the Common, the Commoner may distrain them Damage-Feasant, as well as where the Cattle are put into the Common by a Stranger. *Godbolt* 185. *Morris's Case*.

If a Man had Common for 10 Beasts, and he puts in more, the Surplusage beyond the 10 may be taken Damage-Feasant. 46 *Ed.* 3. 12. b.

If

If there be a Shack Common in a Vill, where every one knows his Part, but it lies in Common; yet no Commoner may avow the taking the Beasts Damage-Feasant in any part of the Common, but in that which is his own Part. *Mich. 8 Jac. B. C. Broadrig's Case.*

In what Cases the Commoner may distrain the Beasts of the Lord Damage-Feasant, *Vide supra.*

*Who may join in one Claim for Common  
or not.*

Inhabitants in a Forest ought not to join in one Claim. *Jones Rep. 275, 286.*

Tenants in Ancient Demesne may join in Claim for Common.

Copyholders may join, who are Tenants to one Lord; and here the Lord must prescribe for him and his Tenants.

Where Tenants in Common shall join in an Action for a Tort, to the Common, or not, *Vide infra. p. 75, 76.*

The Case was for Disturbance of Common Appendant to his Land; He declared, That *A.* was seised of the Land for Life, Remainder to *B.* in Tail, the Remainder to the right Heirs of *B.* and that Time out of Mind they had Common in this Land for themselves, Farmers and Tenants, and that the said *A.* and *B.* let the Land to him for Years, whereupon he put in his Cattle, and was disturbed. It was moved in Arrest of Judgment. 1. Because he sheweth not how the particular Estate begun. By *Wray*, It's a good Exception; for the Plaintiff must sufficiently entitle and enable himself

Distinct Title.  
Demise by Tenant for Life, and him in Remainder, how to be pleaded.

Where the life of Tenant for life need not be averred.

Verdict.

Substance.

Where the quantity of the Acres, and to which, need not be found, because only Inducement.

to the Action, which he pretends to be, because of his Interest in the Land; and then he must shew a sufficient Right and Interest in his Lessor. 2. The Prescription cannot be by the particular Tenant, and here he joins the particular Tenant, and the Remainder. By *Wray*, he ought to make a distinct Title to the Common, and not confound them as he has done. 3. He counts that the particular Tenant, and he in Remainder did demise, whereas it is but the Confirmation of him in Remainder. But *per Cur'*, It is the Lease of both, 4. He doth not aver the Life of Tenant for Life. *Per Cur'*, It need not be averred, for it is the Lease of one that had the Inheritance. *Cro. Jac. Pas. 153, 154. Honeywood and Husband's Case.*

The Plaintiff declared, He was seised in Fee of a Messuage, 60 Acres of Land, 60 Acres of Meadow, and 50 Acres of Pasture in *H.* And that he and all his Ancestors had had Common Appurtenant in 200 Acres of Waste, and that the Defendant had enclosed 3 Acres thereof, and disturbed him of his Common, *ad damnum*. The Verdict finds, That he had Common to a Messuage, and 90 Acres of Land, Meadow and Pasture thereunto appertaining; and for the Residue that he had not Common: And it was assigned for Error, That they have not found such Common whereof the Plaintiff counts, and shew not the quantity of the Land, Meadow and Acres respectively. But *per Cur'*. The Common is but Inducement to the Action, and the substance is the Enclosure, which made the *Tort*; and if he had had Common to more or less Land,

Land, it had not been material to this Action, or on this Issue; but had it been upon a Special Issue, whether he had Common for so much Land, it might have been otherwise. *Note*, The Judgment is *qd' Def. sit in mia'*, and also the Plaintiff *in mia' pro falso clamore suo, &c.* for that Land which is found against him, which is not material; but yet it's good enough, because his Complaint was false in some Part. 8 Rep. 62. *Beecher's Case*, Cro. Jac. 629. *Eardley and Turnock's Case*.

*Declaration and Pleading in an Action brought by a Commoner.*

*Where he must make a Title, and where he need not.*

In an Action on the Case for Disturbance of Common. The Plaintiff declared on Seisin of one Acre in Fee, and of another for Years, and that he had Common for all Cattle *Levant* and *Couchant* upon both Acres. The Defendant justified for Common also. And it was found he had not Common. The Plaintiff need not make any Title in his Declaration, (6 Co. 50. b.) being grounded on the Possession only. So of stopping a Way, a Watercourse or Lights, there needs no Title, the Cause hereof being the Damages only, and the Title is collateral. So in Trespass the Title is not necessary. 3 Keb. 820. *Saunders and Williams's Case*.

If a Commoner bring an Action on the Case for Depasturing and Consumption of the Grass, it must be such as he may declare *per qd' proficuum suum amisit*, and not every petit Damage: But the Lord of the Soil, or Ter-



Custom laid,

Uncertainty.

tenant may have an Action of Trespass done in a Waste or Common, be it more or less. In an Action on the Case the Plaintiff declared upon the Custom of Commoning in such a Place: The Defendant demurred to the Declaration, and for Cause shews the Custom was not well laid; for the Plaintiff declares of a Custom of Commoning *pro averiis*, viz. *pro equis, bobus, equabus & pullis*, and the word *pullus* is of an uncertain Signification; for it may signifie a Calf, a Lamb, or any other young Beast or Fowl. And *per Curiam*, The Exception is good. If the Prescription had been *pro omnibus averiis*, it had been good, and the (*viz.*) should have been void; but here it's only *pro averiis*. *Et Nil capiat per billam.* 9 Rep. *Mary's Case*, 2 Leon. 184. Cro. El. 198. *Styles's Rep.* p. 289. *Chapman and Brook's Case*, 23 Car. 1. 1 *Scyar and Dyer's Case*.

Verdict.

The Plaintiff counts in an Action on the Case for Depasturing, &c. his Common, That the Defendant put in his Beasts (which is a *Mis-feasance*. Yet the Action is good, for the Feeding by which the Common is destroyed, is found, which is the Substance; and it's not material how the Beasts came in, and the Plaintiff is a Stranger: But I conceive the Defendant might have pleaded, that the Beasts escaped for want of Fencing, had the Case been so. 9 Rep. 484. *Mary's Case*.

As for Declarations on Prescription, *Vide infra Tit. Prescription;*

*Claydon* brought an Action on the Case against *Sir Jerom Horsey*, for erecting an House in a certain place called *Risborough-*  
Com-

*Common.* And alledged in certain, That every one who had Common in *Risborough* aforesaid, &c. and did not alledge, That the Common is in the Manor of *Risborough*: But he declared, That there is such a Custom in the Manor of *Risborough*. And *per Cur'*. The Declaration is good, because there is but one *Risborough* alledged, and therefore of necessity it must be meant *de Manerio*. *Godb.* 252. *Claydon* and *Sir Ferom Horsey's Case*.

Where a Commoner need not make Title by Prescription in his Declaration. *Vid. infra Tit. Declaration, Prescription.*

The Plaintiff declares in an Action on the Case, That a long time before, and yet, he is seised of certain Messuages and Lands in, &c. and that he had to these Messuages Time beyond Memory, Common Appendant in 600 Acres of Waste, and that the Defendant had made certain Cony-burrows, where the aforesaid Conies eat up the Grass. And the Defendant digged the Heath, &c. 1. Exception, It is not expressly alledged, That he was seised of the House and Land, to which the Common is Appendant at the Time of making the Cony-burrows; but that long before, and he is seised, but not at the Time of making the Warren. *Per Cur'*. The Declaration is good. 2. Exception, He declared, That the Defendant had made Cony-burrows, and with the aforesaid Conies had eat up the Grass, where he had not alledged any storing of the Cony-burrows with Conies. As to this Point it's ill, yet the digging the Cony-burrows is to the Prejudice of the Plaintiff, and sufficient to maintain the Action. *Quare* of the

Averment.

## The Law of Commons.

the first Exception, for though to say the Lessor was, and yet is seised, is a sufficient Averment of the Life of the Person, (as *Winch* said) yet in the principal Case a *Tort* may be made, and he not seised, at the time tho' he was seised before and after. As in Case of Grant and Repurchase; yet after Verdict it's good. *Winch* p. 16, 17. *Grice* and *Lee's* Case.

In an Action on the Case for enclosing a Field where the Plaintiff ought to have Common, and shews that the Copyholders in 10 Acres which were the Plaintiff's, have used to have Common for certain Beasts, from the 4th of *August*, till *All Saints* day in 4 Acres; and shews that the Defendant the 1st of *May*, which was before the Time for Common, had enclosed the said 4 Acres *sepibus per q'd* he could not have his Common: The Defendant Pleads not Guilty, and it was found for the Plaintiff: It was moved in Arrest of Judgment, because he ought not to have Common till the first of *August*. And he had alledged, That the Enclosure was the first Day of *May*, and had not alledged that it continues, and so it does not appear to the Court, that he had Cause of Action. By *Richardson*, The conclusion *per quod, &c.* is a good Averment, and though it had not been good, yet the Jury found him Guilty; for if the Enclosure did not continue, the Defendant was not Guilty. And Judgment was given for the Plaintiff. But by *Dodderige*, the *per quod* being the Conclusion of the Plea, cannot amount to an Averment; but if any matter be in the Declaration that amounts to an Averment, it's good; but the *per q'd* is an Illation, and an Inference

Saith not the  
Enclosure con-  
tinued.

Made good  
by Verdict.

*Per quod, &c.*  
is no sufficient  
Averment.

ference out of the precedent Declaration, and does not amount to an Averment ; for it is the Conclusion and not the Matter of Action : But all agreed, That after a Verdict the Declaration is good.

*Vide Levant and Couchant, infra Tit. Prescription.*

Declaration by a Corporation. *Vide 1 Saunders, Rolins and Hoskins's Case.*

*Pleadings to Actions on the Case, or Trespass, brought by a Commoner.*

An Action on the Case for digging the Soil, and spreading it on the Land, *per quod* he lost his Common, &c. The Defendant pleads, He was Owner of the Soil, and digged a Pit for Coals, doing as little Damage as could be, and leaving sufficient Common. The Plaintiff demurs specially, as amounting only to the General Issue. The Bar is good, he has Election to plead as here, *or non cul*. The Commoner has Right all over the Common, and therefore he shall have an Action against a Stranger ; but the Owner of the Soil digging part he must justify specially, as on Approvement. *1 Keb. 390, 454. Coe and Canthorn's Case.*

Owner of the Soil must justify.

An Action on the Case by a Tenant at Will, for Destruction of his Common of Pasture, with the Conies of the Defendant, and Building an House upon the Common. The Defendant pleads a Grant by King James, of the Manor of Bromsgrove, and Free Warren within it, and justifies. The Plaintiff demurs. *Per Cur*. The Plea is ill ; for the King cannot grant a Free Warren. Justify by Grant of free Warren. The King cannot Grant a free Warren to the Prejudice of a Commoner.



## The Law of Commons.

a Free Warren to the Prejudice of a Commoner. 3 Cro. 462. and the Grant may not enable one to erect an House. Sir Tho. Jones p. 5. *Timberley* and *Grubham's* Case.

Declaration  
for a Tort  
ought to shew  
a Right.

*Damnum sine  
injuria.*

Variance be-  
tween the O-  
riginal and  
the Declara-  
tion.

An Action on the Case, for that he digged a Pit in such a Common, by occasion whereof his Mare being straying there, fell into the said Pit and perished. The Defendant pleaded *non cul'* and found for him. The Plaintiff moved in Arrest of Judgment (to save Costs) that the Declaration was not good; for when the Mare was straying, and he shews not any Right why his Mare should be in the said Common, the digging of the Pit is lawful as against him, and though his Mare fell in there, he had not any Remedy; for it is *damnum absque injuria*, and so an Action lies not for him. And so was the Opinion of the Court. And it was adjudged, upon the Declaration, and not upon the Verdict, that the Bill should abate. Cro. Jac. 158. *Blyth* and *Topham*.

The Original Writ was, That the Plaintiff was seised in Fee of 60 Acres, &c. and that he and all his Ancestors had Common Appendant, &c. And that the Defendant had enclosed three Acres thereof, and disturbed him of his Common to his Damage of 40 l. The Declaration supposed to the Plaintiff's Damage of 100 l. *Per Cur'*. This Variance between the Original and the Declaration is not Error, being after a Verdict and not Guilty pleaded, and the Jury finding but 12 d. Damages it's well enough, especially now upon the Statute of 18 Eliz. the Variance not being Matter of Substance; though this had been

been a good Exception in the Common Bench before Plea pleaded : But if the Verdict had found more Damages than were comprised in the Writ, and less than is in the Declaration, the Judgment had been erroneous, for there is not any Writ to warrant it. *Aliter*, when the Damages are less than they be in the Writ or Count. *Cro. Jac. 629. Earley and Turnock.*

Who may have these Remedial Actions in respect of their Estate, or in Reference of Joinder in Action. *Vide supra.*

If a Commoner hath an Estate by Copy, at Will, for Term of Years, or Freehold, he may have an Action on the Case or Trespass, according as the Tort is. Two Tenants in Common of a Common are ; and the Terretenant or a Stranger chaseth the Beasts of one Tenant in Common, he only may have an Action on the Case ; otherwise, if they plow the Land, or do an equal Tort. For the Rule is, Where the Tort is as great to one Tenant in Common as to the other, there they shall join in a Personal Action. Another Difference was, as to Tenants in Common joining, or not ; if one Joint-tenant, or Tenant in Common bring an Action solely, and the Defendant pleads Not guilty, and by the Verdict it appears, that the Defendants are Tenants in Common, there the Plaintiff shall have Judgment, because he ought to have pleaded in Abatement of the Writ ; but if it appear by the Declaration, or the Plaintiff's own Shewing, that he had a Difference Companion not joined with him, Judgment shall be arrested, as it was in the Principal Case. *Latch, p. 152. Hardman and Which-lop's Case.*

Where Tenants in Common shall join or not.

Difference betwixt what appeared on the Verdict, and what of the Plaintiff's

The own shewing.

Baron and  
Feme.

The Husband brought an Action on the Case without his Wife, for Disturbance of the Common which he claimed in the Right of his Wife. *Vide 2 Bulst. 14. Baker's Case.*

Tenant at  
Will.

Tenant at Will may have an Action on the Case, for the Destruction of his Common of Pasture, with Conies of the Defendant, and building an House on the Common, *Sir Tho. Fone's Rep. 5. Timberly against Grubham and How.*

Joint-tenants,  
&c.

If two Joint-owners of a Sum of Money are robbed of a Sum of Money on the Highway, they may join in one Action again the Hundred. *Dyer 370. vide 2 Leon. 12.*

Joint Action.

If the several Cattle of *A.* and *B.* are distrained, and *C.* in Consideration of 10 *l.* paid him by *A.* and *B.* promises them to procure the Cattle to be re-delivered to them: If they are not re-delivered, one joint Action lies. For 'tis said the Consideration is intire and cannot be divided. *Style, 156, 157, 203. Vide 1 Roll. Abr. 31. Z. 9.*

Heriots.

*A.* holds Lands of several Lords by Heriot-Custom, and to defraud them of their Heriots makes a fraudulent Gift of all his Beasts heriotable, 'Tis said all the Lords may join in an Action for this Tort upon 13 *Eliz. Dyer 341. sed Quære.*

C H A P. IX.

Of particular Remedies, and Actions which a Commoner may have for Disturbance, Enclosure, Destruction, Surcharging, &c. Of Assize. What is sufficient Seisin to have Assize of Common. Where, and in what Cases the Commoner shall have Assize, and how to be brought. Of Pleadings in Assize. Of a Quod permittat. Admeasurement of Pasture, where it lies, and the Process thereupon, and where after Judgment on a Surcharge a Secunda superoneratione lies.

**A**ND first of Assize, *Vide supra Assize per Estovers, Turbary.* But Note, Of a Common a Man cannot be disseised if he will. 1 Keb. 511.

*What is sufficient Seisin to have Assize of Common.*

Putting in of Cattle is Seisin, but not a Tortious Putting in; if I put in the Beasts of a Stranger to give me Seisin, it shall be good. *Fitz. 180. F. 7. K.*

If a Man recover Common, and the Sheriff upon a Writ of Seisin comes to the Place, and delivers to him Seisin by Parol; this is good to have an Assize. 1 Roll. Abr. 404.

Seisin of Lessee for Years of Common is good for him in the Reversion; so the using of Common by Tenants at Will, is Seisin sufficient for a Reversioner to have an Assize. Grantee for Years of a Common useth it,



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it, this gives Seisin to him in Reversion. 6 Rep. 57. *Brediman's Case*, 1 Roll. Abr. 404.

*Where, and in what Cases the Commoner shall have an Affize, and how to be brought.*

If a Commoner hath Freehold in a Common, and the Lord or any other depasture and consume all the Grass, the Commoner shall have an Affize; but it ought to be such, *per quod proficuum suum amisit*. 9 Rep. *Mary's Case*. *Bridgman*. p. 10. 4 Rep. 37.

And if the Lord surcharge the Common, an Affize lies, but not an *admeasurement* of Pasture. *Fitz.* 125. D.

If the Lord approve and not leave sufficient, the Tenant shall have an Affize. *Fitz.* 125. D.

And by the Statute of *W. 2. cap. 25.* Affize lies of Common of *Turbary*, *Pischary*, &c. as well as of Common of Pasture; for at Common Law before that Statute there were but two Writs of Affize of *Novel Dissein*, (*viz.*) An Affize *de Libero Tenemento*, and an Affize *de Communia Pasturæ* for his Cattle, which was so necessary, that without it his Freehold could not be manured; and the Affize *de Libero Tenemento* did lie of Houses, Land, Rent and other things which lay in Render, whereof a *Præcipe* did lie at Common Law; but of Profits Appreder which consisted in *Capiendo*, *Colligendo*, *Habendo*, *Recipiendo* & *Exercendo*, no Affize lay at Common Law, but the Party was driven to his *Quod permittat*, in which was great Delay, and they which had but an Estate for Life, could not maintain that Writ. And there-

therefore an Affize lies of Common of *Turbary*, *Pifchary*, or *Estovers*, which confift in *Capiendo*, and fo the Act exprefleth it in particular, and in other like Commons, which any hath appertaining to his Freehold, or by Special Grant, at leaft for Term of Life; now when a Man claims Common in the feveral Land of another, or as the Statute calls it, *Pascat alterius feperale*, &c. that is, Where one claimeth Common Appendant, Appurtenant, in Grofs, and for the Ufe of the fame doth put in his Cattle, this Claim and Putting in of his Cattle is a Diffeifin of the Severalty of the Land: And in that Cafe the Owner of the Soil may bring his general Writ of Affize of *Novel Diffeifin*; and if the Tenant plead, that the Plaintiff was Tenant of the Land the Day of the Writ purchafed, and yet is, that the Land was and is his Several, and the Defendant did feed his Several with his Cattle, and prays the Affize: And if it be found for the Plaintiff, he fhould have Judgment to hold the Land as his Several, and Damages. But if the Cattle come in by way of Escape, this is a Trefpafs and no Diffeifin of the Severalty.

Trefpafs and  
no Diffeifin.

A Man feifed of Land whereunto Common is Appendant is diffeifed, the Diffeifee cannot ufe the Common until he entreth into the Land whereunto it is Appendant. But if a Man be diffeifed of a Manor whereunto an Advowfon is Appendant, he may prefent unto the Advowfon before he enters into the Manor: And the reason of this Diversity is, becaufe in the Cafe of the Common, it fhould be a Prejudice to the Tenant of the Soil;  
for

Note.

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for if the Disseisee might do it, the Disseisor might also put in his Cattle, which should be a double Charge to the Tenant, but not so of an Advowson. *1 Inst. 122. Cheney and Fisher.*

In Assize of Common, all the Tenants of the Land *dont' le Common, &c.* ought to be named. *Fitz. 180. L. 4 Co. 37. b. 9.*

Remedy by  
Assize gone  
by Feoffment.

But Note, If a Man be disseised of Common Appendant or Appurtenant, and after he makes a Feoffment of the Land to which, &c. he shall never have Assize or any other Remedy. *Fitz. N. B. 180. F.*

Assize abated.

And also, If the Plaintiff use the Common depending the Assize of Common, the Writ shall abate: *Aliter* if the Cattle escape. *Fitz. 183. M.*

Verdict.

In Trespass, if the Defendant justify the putting in his Cattle for Common, which he claims from *Pentecost* to a certain time every Year, which is traversed *modo & forma*, and the Jury find that he had Common *in vigilia Pentecostis, in festo*, and the Day next to this, to the Time, this is found for the Defendant; otherwise in an Assize of Common, because there he ought to recover his Title. *Trials per pais 297.*

Where Assize  
lies, and not  
Admeasure-  
ment of Pa-  
sture.

If the Lord surcharge the Common, the Tenant shall not have a Writ of Admeasurement of Pasture against him, but he shall have an Assize of his Common against his Lord. *Fitz. N. B. 125. a.*

So if the Lord approve the Common, and does not leave sufficient Common to the Tenant, the Tenant shall have an Assize, and not a Writ of Admeasurement.

*Pleading.*

In Affize of Common, if the Defendant saith, That the Land where, &c. is *hors de son Fee*, &c. although this is not a Plea to put the Demandant to make Title in the Affize, yet if he make Title upon a Grant within Time of Memory, he shall be estopped after in another Action to claim the Common by Prescription; but if after in another Action between them he make Title by Prescription, and the other admit it, this last Estopple shall avoid the first Estopple, so that he may make Title to the Common by Prescription. 11 H. 6. 27. b. Estopple.

*Quod permittat.*

When a Man has Common of Pasture for Where it lies. his Beasts, and he is disturbed by a Stranger, so that he cannot use his Common, then he shall have a Writ of *Quod permittat*, if he be utterly disturbed of his Common. Fitz. N. B. 123. Bridg. p. 10.

This Writ lies of Common of Pasture, Tur- Writ. bary, Piscary, and *de rationabilibus Estoveriis* against the Disseisor himself or his Ancestor, and not in other Degrees.

If it be of Common in Gross, then these Common in Words ought to be in the Writ, *tanquam per- Gross. tinens ad Liberum tenementum suum.*

The Parson of a Church shall have a *Quod Parson. permittat* of Common in the Right, and also in the Nature of a Mortdauncestor. 2 Inst.

G

But



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But I shall say no more of *Quod permittat* or *Affize* for Common, these being now generally turned into Trespasses and Actions on the Case.

*Of the Writ De admeasurement Pasturæ, or Admeasurement of Pasture; Where it lies, and the Process thereon; and where after Judgment on a Surcharge a Secunda superoneratione lies.*

*Admeasurement* of Pasture is, where Commoners have Common *Appurtenant*, (*sed Quære of Appendant*, 2 Inst. 86.) 1 Roll. Rep. 356. to their Freehold, and one surchargeth the Common by putting in more Beasts upon the Common than he ought, the Commoner who finds himself aggrieved, may have against him this Writ of Admeasurement of Pasture, and by this Suit all the Commoners as well those which have not surcharged the Common, as those that have, shall be admeasured. *Fitz. N. B.* 125.

Writ of Admeasurement.

What Remedy if the Lord surcharge, what if the Tenant.

Where it lies.

*Note*, This Writ is *Vicountiel*, and is not returnable.

If the Tenant surcharge, the Lord shall not have this Writ against the Tenant, but he may distrain the Surplusage Damage-Feasant, *Vide 1 Danv.* 809. 1. & *N. Lutw.* 394. also if the Lord surcharge the Common, the Tenant shall not have this Writ against the Lord, but he shall have *Affize* of his Common against his Lord. *Vide post* 89.

This Writ lies where one hath Common Appurtenant for a certain Number, or Common by Especialty for a certain Number: But he which

which hath Common Appurtenant without Number, or Common in Grofs *sans Number*, this Writ lies not against him. F. N. B.

125. D,

But in such Case the Tertenant may distrain the Cattle. *Vide 1 Saund. 345.*

This may be moved out of the County by Removal *Pone* into the *Common Pleas*; and the Proceedings thereon see in *Fitz. ubi supra.*

If one be once admeasured by a Writ of Admeasurement of Pasture directed to the Sheriff *per* the Sheriff, and after he surcharge the Common again; then the Party who sued the first Writ shall have another Writ to the Sheriff called a *Secunda superoneratione*, the Effect of which Judicial Writ is, that the Sheriff in the presence of the Parties, if they will be present, being warned, shall enquire by a Jury of the second Surcharge, and what Cattle surcharged, and the Value; which if it be found and returned under the Seal of the Sheriff, and the Seals of the Jurors, the Justices shall adjudge Damages to the Party, and the Cattle shall be forfeited to the King. But *Observe*, This Writ of *Secunda deliberatione*, lies not but against them that are named and thereof convicted in the first Writ: But enough of this to shew how the Law is in these Cases; for this sort of Remedy is much out of Use. *Fitz. N. B. 126. b. Co. sur W. 2. c. 8.*

*Secunda super-  
oneratione.  
Where it  
lieth.*

And against  
whom.

## C H A P. X.

*Of Actions on the Case or Trespass brought by a Commoner. For what Causes. Where and what Title he must make. And where he need not. The manner of Declaring. What Justification is good, or not. Variance between the Original and Declaration. Who may join in one Claim for Common, or not. Who may have these Remedial Actions. Tenant in Common. Baron and Feme Tenants at Will. Joinder in Action. Of Action brought against a Commoner, and Declarations and Pleadings therein.*

For stopping  
a Way to the  
Common.

Affize, Case  
of Election.

For Plowing  
up Lands in  
which.

**A**CTION on the Case lies for stopping his Way to the Common. Formerly it was held, that if the Defendant *totaliter* had stopt up the Way, that an Affize of Nuisance lies; but if it were stopt up in Part, an Action on the Case; but it was resolved, that for totally stopping up the way an Affize of Nuisance or Action the Case lies at the Election of the Party, be the stopping by the Tenant of the Freehold, or by a Termor, or by an Estranger. *Cro. Eliz.* 845. *Cantiel and Church*, *Style's Rep.* 164. *Ayre and Pinchcomb*.

Plaintiff declared that he was seised in Fee of certain Lands, and that he and all those whose Estate, &c. have Common of Pasture in sixteen Acres of Land called D. from the time that the Corn was reaped till, &c. and also Common of Pasture in Lands called R. *omni tempore Anni*, as Appendant to the said Messuage

Messuage and Land, and that the Defendant had plowed the said Lands, and so disturbed him of his Common; it was moved in Arrest of Judgment (after Verdict *pro Quer'*) that it appeareth, that the Plaintiff was seised in Fee, and so he ought to have an Assize; but *per Cur'*, He may also have an Action on the Case, Assize, or Case at Election, for a Commoner in Fee. and therefore the Difference in *Robert Morris's Case*, 9 Rep. is over-ruled. 2 Leon. p. 184. Case 229. *Levered and Townsend, Holland and Leveret cited in Morris's Case.*

A Copyholder Commoner may have an Action on the Case against a Stranger, for entering and taking the Turfs, if the Declaration be laid that he entred with Horses and Waggon, and so impaired his Common. 1 Roll. Abr. 89. *Terry and Goodier.* For taking Turfs.

One Commoner alone may have Action on the Case against a Stranger, for depasturing his Common, for he may take them Damage-Feasant, and that proves he has a Wrong; and by the same Reason if the Beasts are gone before his coming, he may have an Action on the Case; for otherwise one that has many Beasts may destroy all the Common in a Night, and shall not be punished; and it's not like to a publick Nuisance, which is punishable in a Leet, but the other is private to the Commoners, and one Commoner may have this Action, though every other Commoner may have the same Remedy. My Lord *Hobart* citing this Case of *Morris* in *Cowper* and *Andrews's Case* saith, If the Lord of the Soil plough it up, or make a Water of it, every Freeholder may have an Assize, and every Copyholder an Action on the Case. So is

One Commoner alone may have an Action on the Case.



## The Law of Commons.

*Whitland's Case* cited in *Crogate and Morris's Case*. 2 *Brownl.* 149. 9 *Rep.* *Robert Morris's Case*. 2 *Brownl.* 147. *Crogate and Morris, Heb.* 43.

Tenant at Will shall have an Action on the Case for Destruction of Pasture with the Cows of the Defendant, and building an House on the Common. *Sir Thomas Jones p. 5. Timberley's Case.*

Action on the Case for inclosing Common. The Prescription is to have Common when the Corn is reap'd *quousque reseminaretur*: Judgment *pro querente*; but an Action lies not for not Ploughing. *Vide infra.* 2 *Keb.* 838. *Miller and Clerke.*

Case per Commoner, for Estovers.

He that claims Common of *Estovers*, if the Owner of the Soil cut down all the Trees first, the Commoner cannot take them, but shall have his Action on the Case. *Vide supra. tit. Estovers and Remedy. Yelv.* 187. *Dowglas and Kendal's Case.*

Action on the Case lies against the Lord for surcharging the Common; *vid. supra.* Action on the Case lies by a Commoner against the Lord for eating up his Common, where the Lord is excluded as to Time. *Vide supra Whitland's Case.* So he may have an Action on the Case against the Lord for digging Pits. *Vide supra tit.* What Commoner may do in reference to the Lord.

Commoner shall not have an Action of Trespass *quare clausum fregit.* *Vide supra.*

A Commoner cannot have an Action of Trespass for breaking the Soil, for the Soil belongs to another; but an Action on the Case  
he

he may, *per quod proficuum suum amisit. Vide infra.*

*Note,* There is a Diversity between an Action of Trespass, and an Action on the Case, as to entire Damages. *Vide tit. Damages.*

If one who has no Right to Common does put his Cattle upon the Common, he who is a Commoner, may take the Cattle Damage-Feasant upon the Common; and it is not necessary for him to aver, that he hath Damage by them, for he hath an Interest, and that doth authorise him to remove the Nuisance; but he must make Title to the Common, and if it be but by Implication only, it's well enough after a Verdict, though he shew not that he hath Common for Cattle *Levant* and *Couchant*. *Vide Declaration, infra tit. Prescription. Style 482. Bronge and More's Case.*

Distrain Damage-Feasant.

What Title the Commoner must make to the Common

Where he need not shew he has Common for Cattle *Levant* and *Couchant*.

*Actions brought against a Commoner, and Declarations and Pleadings.*

Trespass is brought against a Commoner. Commoner He justifies by filling up Trenches made by the Lord. *Per Wyndham*, He may fill them up. *Per Kelynge*, He cannot, but where a Stranger digs: But he may have an Action on the Case against the Lord; the Reason why he cannot fill up a Ditch is, because the Soil is intermeddled with. *1 Keb. 884, 936. Howard and Spencer.*

Commoner may have an Action on the Case against the Lord for digging Trenches. *Q. If he may fill them up.*

If a Man which claims Common Appurtenant, puts in any Beasts which are not *Levant* and *Couchant*, he doth Wrong to the Lord, and shall be punished as a Trespasser. *2 Saund. 327.*

Where a Commoner shall be a Trespasser.

Trespass.

Trespass, *quare clausum fregit, & herbam ovibus suis depastus est.* The Defendant saith, That at the Time of the Trespass he was seised of the Manor of *A.* and that he and all those whose Estate he hath, &c. had a Sheep-walk in the Place assigned for all the Year, for all Beasts *Levant* and *Couchant* upon the Manor, &c. The Plaintiff replies, That the Defendant such a Day put 200 Sheep on this Land, and that these Sheep were *Levant* and *Couchant* upon the Chantery-Fold. The Defendant demurs. The Replication is ill; it's not a Confession and Avoidance, nor a Traverse of the Bar: If he had said *ducentas alias oves*, the Justification had been avoided, and the Defendant might have pleaded Not guilty to them. And when he said they were *Levant* and *Couchant* upon the Chantery-Fold, yet this is but an Argument. He should traverse *absque hoc* that it was parcel of the Manor; and an express Allegation of the Bar may not be answered by Argument. *Lit. Rep. 45. Johnson and Norris's Case.*

Traverse.

C H A P. XI.

*What Interest the Lord hath in the Soil and Commoning, and his Remedy for any Damage, Disturbance, &c. Of Approvement by the Lord. Where and in what Cases Approvement may be made by the Lord, or not, and how Approvement must be. Of what Thing or Common Improvement shall be, or not. Remedy for the Commoner, if the Lord on Approvement leave not sufficient Common, and how the Sufficiency shall be tried.*

**T**HE Lord may distrain for Damage. Distrain.  
Feasant, or other Damage in his Soil, the Beasts of any one who had not Right to put them there, tho' he had not any Interest in the Herbage. 2 Saund. 328. Huskins and Robins's Case.

The Lord may have an Action for every small Trespass; but the Commoner shall not have his Action on the Case for every small Trespass. Trespass.  
*Vide supra Fitz. N. B. 38.*

If the Lord claim Common in his Freeholders Land, it shall be intended to be reserved upon the first Contract for the Land. *Lit. Rep. 264.*

If a Tenant who had Common *Sans Number* surcharge the Soil, the Lord may distrain him; but the Writ of *Admeasurement* lies not. 1 Saund. 344, 345. *Ante 82.*

If the Owner of the Soil grants Common *Sans Number*, yet he ought to have sufficient Common. 1 Roll. Abr. 396.

IF



## The Law of Commons.

If the Lord alien in Fee the Soil where Common is taken, saving his Power of Pasture as Lord, he shall have Common there as Lord; *aliter*, without any saving; but the Alience of the Soil may pasture it as the Lord had done before. 1 Roll. Abr. 396.

### Of Approvement by the Lord and Tenants.

Where the  
Tenant may  
Improve.

Before the Statute of *Merton c. 4.* at Common Law the Lord could not approve; because the Common issued out of the whole Waste, and every Part thereof, except in case of Common Appendant. But by this Act he may approve against a Tenant, that has Common of Pasture Appendant, although the Common Appendant be without a certain Number, as to have sufficient Pasture for Beasts, *Quantum pertinet ad Tenementa sua.* Now by the Stat. of *W. 2. c. 46.* the Stat. of *Merton* extends not only between the Lord and Tenant, but between Neighbour and Neighbours; for many Lords of Wastes, Woods and Pastures, have been letted to make Improvement by the Contradiction of Neighbours, though they had sufficient Pasture: If the Lord has Common in the Tenant's Ground, the Tenant may improve within this Act of *W. 2. c. 46.*

*Where, and in what Cases Approvement may be made by the Lord, or not; and how this Approvement must be.*

How Im-  
provement  
must be made.

As to the manner how the Improvement must be; it must be divided by some Enclosure

sure or Defence, so as it may be made several; for it is lawful for the Tenant to put his Cattle into the Residue of the Common; and if they stray into that Part, whereof the Improvement is made, in default of Enclosure, he is no Trespasser. Now by the Statute of *W. 2.*

2. if Persons unknown in the Night, or otherwise, so secretly prostrate the Ditches, Hedges,

&c. so as the Lord cannot know against whom to bring his Assize, or other Action; and the

Men of the Towns next adjoining do not indict the Misdoers, those next Towns shall be

distraigned to make the Hedge or Ditch at their own Cost, and yield Damages to the Lord;

and they have a Year and a Day for the Indicting of them: And by the Indictment, the

Lord shall know against whom to bring his Action; and if they do not, the Lord shall

bring his Action upon this Statute against them. *Co. sur Stat. Mer. c. 4. W. 2. c. 46. Sir*

*Will. Mallories's Case. 1 Roll. Rep. Sir J. Procter and Mallory's Case.*

See the Form of the Writ, for the Lord framed on this Statute of *W. 2.* for throwing

down Enclosures, and the Sheriff's Demeanor therein, and Return thereof, and the Process

therein. *Cro. Car. 280. Vide p. 439. 580. Le Roy ver. Les Inhabitants de Epworth & 15*

*Vills adjacen. 1 Keb. 829. Le Roy against the Inhabitants of St. Brevills.*

The Lord pleads in an Action on the Case by a Commoner, for digging of Pits, that he

is Lord of the Soil, and that he digged Coals, leaving sufficient Common, &c. *Per Cur'.*

The Lord may not dig Pits, whereinto the Beasts of the Commoner may fall; for the

Statute of  
*W. 2. c. 46.*  
of prostrating  
Enclosures by  
Night.

An Action on  
the Case by  
Commoner,  
digging of  
Pits by the  
Lord, no Im-  
provement.

Statute

## The Law of Commons.

Statute intends other manner of Improvement, *scilicet* by Enclosure. *Sid. p. 106. Goe and Cotler, 1 Keb. 453. Mesme Case.*

No Improvement against a Man's own Grant.

One cannot improve against his own Grant, though it be to a certain Number. *1 Keb. 430.*

The Lord by the Statute of *Mert.* ought to leave sufficient Pasture for Common, and Egress and Regress from the Tenements to the Pasture. *So per Stat. W. 2.*

The part approved is discharged of Common.

If the Lord doth improve part of the Common, he shall not have Common in the Residue of the Land, for the Lands improved; because he cannot prescribe for that which is so improved. *4 Leon. 44.*

*Of what Things or Commoning, Improvement shall be or not.*

To what sort of Common the Statute extends, and to what not.

Neither the Statute of *Merton*, nor the Statute of *W. 2.* do extend to any Common, but to Common Appendant, or Appurtenant to his Tenement, and not to a Common in Gross, to a certain Number, or by Grant. *Co. sur Stat. W. 2. 46.*

Five Sorts of Improvements without leaving sufficient Common.

But there are five kinds of Improvements, that both between Lord and Tenant, and Neighbour and Neighbour, may be done without leaving sufficient Common to them that have it, any thing in the Statute of *Merton*, or *42 W. 2.* notwithstanding. 1. Windmills. 2. A Sheep-house. 3. Cow-house. 4. Enlarging of a Court necessary, or 5. Curtilage: These are but put for Example, for the Lord may erect an House for a Beast-keeper, a Dairy, or Milk-house, &c.

But

But the word *necessary* must be applied to *Necessary In-*  
*Curtilagii*; and it shall not be taken accord- largements  
 ing to the Quantity of the Freehold he has *Curtilagii* how  
 there, but according to his personal Estate or to be under-  
 Degree, and for his Dwelling and Abode; stood.  
 for if he has no Freehold there in that Town  
 but his House only, yet may he make a ne-  
 cessary Enlargement of his Curtilage.

One encloseth two Acres of Common  
 (where were but three Acres) to enlarge the  
 Curtilage of his House, and because it did  
 not appear it was for his necessary Resiance,  
 Judgment was given that he may not en-  
 close. The Case was, The Defendant justifies  
 in three Acres for Common: The Plaintiff re-  
 plies, he has an House adjoining to the Place,  
 in which the Defendant justified for Common,  
 and that by *W. 2. c. 46.* he took two Acres to *Necessary in-*  
 inlarge his Curtilage; and demurs, which is largement,  
 frivolous: It ought to be an Ancient House, and Pleading.  
 and to shew it, though the Party makes no  
 Prescription but only a Privilege, which is  
 given by the Statute to Houses in general;  
 and here needs no Averment that he left suffi-  
 cient Common; the word *necessary* supposeth it  
 should be averred ancient, and not a Necessity  
 of his own making. It's not for Houses of  
 Pleasure or Convenience; an Hop-ground  
 or Park is not within the Statute. Judgment  
 for the Defendant on the Demurrer. *Sid. 79.*

*1 Keb. 283, 314. Nevil and Hamerton.*

A Marsh in Common to two Villis be- *A Marsh.*  
 tween them and their Tenants, by Prescription,  
 for their Sheep, being salt; *Quære* if this may  
 be approved. *1 Keb. 876. Pate and Brown-*  
*low's Case.*

*Re-*



*Remedy for the Commoner, if the Lord on Improvement leave not sufficient Common; and how the Sufficiency shall be tried.*

He may have an Affize; and if by the Affize it shall be found, that the Plaintiff had not sufficient Ingress and Regress, or not sufficient Pasture, then the Plaintiff shall recover Seisin by the View of the Jurors; so that by the Discretion and Oath of them, the Plaintiff shall have sufficient Pasture, and sufficient Ingress and Regress assigned to him, and that the Disseisors shall yield Damages; or he may have Trespass; for many times he shall fail to have a Writ of Affize. Or if the Lord do enclose any Part, and leave not sufficient Common in the Residue, the Commoner may break down the Enclosure, because it standeth upon the Ground which is in his Common.

Bar al Avowry.

**Qd** R. seistus de manerio inclausit & appropriabit parcellam terre vasse inde, & reliquit sufficien communiam & viam p tenent manerij resid.

Repl' **Qd** quer habuit communiam Pastur. Et Traverse qd R. reliquit sufficien communiam & viam in resid.  
Hen. 45, 55.

So it seems, the Commoner in that Case may have an Action of Trespass, &c. against the Lord or any other that either Incloses or surcharges the Common. But in an  
Action

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Action against the Lord the Plaintiff must particularly shew the Surcharge, &c. See 2 Mod. 6, 7.

In an Action of Trespass brought by a Commoner against a Stranger for putting his Cattle in the Common, *per quod Communiam in tam ampli modo habere non potuit*, the Defendant pleads a Licence from the Lord to put his Cattle there, but does not aver there is sufficient Common left for the Commoners; this is no good Plea. For though it may be objected, That the Plaintiff may reply thereto, yet the Surcharge or Want of sufficient Common being the very Gift of the Action, the Defendant ought to plead thereto. 2 Mod. 6. adjudged, *sed Vide* 1 Lutw. 107. And Note, The sufficiency or Non-sufficiency of Common is traversable.

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### C H A P. XII.

*Of Apportionment, Extinguishment, Suspension, Reviver of Common.*

*Where, and what Common shall be apportioned or not.*

Common Appendant is apportionable and severable by the Act of the Party, but Common Appurtenant is not so; as if a Man had Common Appendant in 4 Acres belonging to 20 Acres, if he sell 10 of his Acres, or buy Part of the 40 Acres, the Common may be divided and apportioned, *pro rata* (If it had been

## The Law of Commons.

Common Appurtenant not apportionable.

been Common Appurtenant it had been lost.) So is *Tirringham's Case*. If *A.* had Common Appendant to 20 Acres of Land, and enfeoffs *B.* of Parcel of the 20 Acres, to which, &c. this Common shall be apportionable, and *B.* shall have Common *pro rata*. And when Part of the Land to which, &c. is aliened, there every of them may prescribe to have Common for Beasts *Levant* and *Couchant* upon his Lands. So if a Commoner purchase a Parcel of the Land in which he hath Common, yet the Common shall be apportioned; but it is not so of Common Appurtenant, or any other Common. *Hob. p. 25. 4 Rep. Tirringham's Case, Inst. 1. p. 122.*

Now Common is admeasurable, according to the Quantity and Quality of the Freehold, to which he claims to have common Appendant. 37 *H. 6. 34.*

By a Lease for Years the Common is not suspended or discharged.

In a Lease of a Common, during the Lease for Years the Common is not suspended or discharged; for each of them shall have Common rateable, and in such a manner, that the Land in which, &c. shall not be surcharged; and if so small a Parcel be demised, which will not keep one Ox or a Sheep, then the Common shall remain with the Lessor; so always as the Land in which, &c. be not surcharged. 13 *Rep. 65, 66. Morris and Web's Case, 2 Brownl. 298. Mesme Case, and 1 Brownl. 180.*

Difference between Common Appendant and in Gross, as to Apportionment.

There is a Difference between Common Appendant, which is of Necessity, and Common in Gross; for in the Case of Common Appendant, if one Tenant of the Manor do purchase the Seignior, and then grants over the Tenancy,

Hancy, the Common which he had before shall be still Appendant; *aliter*, of a Common in Gros. Owen p. 122.

Common Appurtenant is against common Right, and therefore not apportionable. 4 Rep. *Tirringham's Case*. And therefore,

If a Commoner purchase Parcel of the Land in which, &c. all the Common is extinct. 8 Rep. 78.

Common Appurtenant, not apportionable by Purchase of part of the Land in which, &c.

But Common Appurtenant and Common Appendant shall be apportioned by Alienation, or Sale of part of the Land, to which Common is Appurtenant or Appendant; so is *Hob. 235*. where one had a Common Appurtenant to 10 Acres, for all his Beasts *Levant* and *Couchant* upon the same, and sells Part of it: It was adjudged, That the Common should be apportioned, and every one should have Common for his Beasts *Levant* and *Couchant* upon his Part; for there are things entire in several Degrees, some that cannot be divided by any Act of the Parties, as Warranty, Conditions, &c. which yet by Act in Law are divided. But the Case of Common is not so strict an Entirety; and the Mischief of the Generality of the Case, requires an Extension for the common Good. And so is *Wiat Wild's Case*, in Co. 8 Rep. *J. S.* seised of one Messuage and 40 Acres, Time whereof, &c. had Common of Pasture in 200 Acres, in the said Manor of C. *J. S.* enfeoffs *J. B.* of 5 Acres in Fee, *J. B.* shall have Common of Pasture in the said 200 Acres, *pro omnibus averiis suis communicalibus super præd' 5 Acras terræ Levant', &c.* So that the Rule is; By Purchase of Part of the Land in which, &c. the Common

But that and Appendant are apportionable by Sale of part of the Land, to which, &c.

Regulâ

H

is



is all destroyed ; but by Alienation of Part of the Land commonable, to which, &c. the Common is Apportionable. *Hob. 235. Anonymus, 8 Rep. 79. Wiat Wild's Case.*

'Tis severable.

It appears by the Prescription in *Wild's Case*, That the said Common is severable; for the Prescription is to have Common in the Land, in which, &c. to be taken by the Mouths of the Beasts, which are *Levant* and *Couchant* upon the Land, to which, &c. and this extends to all and every Parcel, and cannot be more Damage or Charge to the Tenant of the Land, in which, &c. after the Severance than was before; for no other Beasts may depasture there, except those which are *Levant* and *Couchant* upon the Land, to which, &c. But if he who has Common purchase Parcel of the Land, in which, &c. all his Common is extinct, or if he take a Lease of Part of the Land, all is suspended; because it was the Commoner's folly to intermeddle with Part of the Land to which, &c. which belongs not to him; but when the Commoner intermeddles but only with his own Lands, by the Alienation of it, this shall not turn to his Prejudice in such a Case; for this is not against any Rule in Law, as the other Case is, when he purchaseth Parcel of the Land, in which, &c. because his Common Appurtenant is against common Right, and he cannot common in his own Land which he has purchased. And if the Law should be otherwise, all the Common Appurtenant in *England* would be destroyed; for no Land continues so intirely as it was *ab initio*; but for Payment of Debts, Advancement of Daughters, Part may be severed; the Alienee therefore shall have Common. *Wild's Case.* Com.

Common Appurtenant may be severed from the Manor, especially when it is granted with Parcel of the Manor. *Jones's Rep.* 397.

Common Appurtenant severable from the Manor.  
Fold-course.

A Fold-course for 300 Sheep may be Appurtenant to a Manor, and this without saying *Levant* and *Couchant*. And if the Lord grant or lease to another Parcel of the Manor, as divers Acres, Parcel of the said Manor, with the said Fold-course, this shall pass as Appurtenant to the said Acres. For it is not necessary for them to be *Levant* and *Couchant* on the Manor, and it's no Prejudice to the Owner of the Land, where the Common is to be taken. *1 Roll. Abr.* 232. *Day* and *Spooner's Case*.

*A.* hath Common of Pasture *Sans Number* in 20 Acres of Land, and 10 of these Acres descend to *A.* the Common without Number is entire and uncertain, and shall not be apportioned, but remain. But if it had been Common certain, (as for 10 Beasts) in this case it shall be apportioned. *1 Inst.* 149. *a.* So is *Cro. Car.* 432. Common certain may well be divided, or annexed to part of the Manor: And so may a Fold-course, which is in the Nature of a Common certain; and there cannot be any Prejudice to the Terretenants, for they cannot be charged with more than they were before. The Case was, In an Action on the Case, *R. F.* was seised in Fee of the Manor of *T.* and he and his Ancestors, Time whereof, *&c.* had a Fold-course for his and their Sheep, not exceeding 300, in 70 Acres of Land in *T. præd'* every Year for 14 Days after the Corn was carried away, *&c.* and shews that he by Deed let to the Plaintiff 75

Where notwithstanding a Descent of Part of the Land to a Commoner, it shall remain, and where it shall be apportioned.

Plea.

Acres, Parcel of the Manor, with the Fold-course, for 5 Years; and that the Defendant had enclosed, and thereby disturbed him of his Fold-course. The Defendant pleads, There is a Custom in any part of his Lands lying in the said Vill, That any one may inclose any Part of his Lands lying in the common Fields, and therefore he enclosed this Land lying in the common Field. It was adjudged, That the Fold-course being in Nature of a Common certain, may be divided and annex'd to Parcel thereof: But the Plea was ill, because he did not traverse the Prescription in the Declaration; and he cannot plead a Prescription against a Prescription; but he ought to answer the Prescription alledged in the Count. And by *Hobart*, in *Roberts and Young's Case*, the dividing of a Common from the Manor cannot prejudice the Common. *Cro. Car.* 432. *Spooner and Day's Case*, *Hob.* p. 286.

Traverse the Prescription laid in the Declaration, and pleading a Prescription.

Common *pro rata*.

If a Man seised of 60 Acres of Land, prescribes to have Common in other Lands for all his Beasts *Levant* and *Couchant* upon it, and he makes a Feoffment in Fee of 5 of these Acres, his Feoffee shall have Common Appportionable *pro rata*; for the Common is joint and several, and no Surcharge or Wrong by this is made to the Tenant. 1 *Roll. Abr.* 235. *Morton and Wood's Case*.

By Lease of Land Common *pro rata*.

If one prescribe to have Common to two Yard-Lands, for four other Beasts, four Horses, &c. after Severance of the Common, and when the Land is not sowed to have Common all the Year; and after he leaseth one of the Yard Lands for Years, the Lessee shall have this Common *pro rata*. 1 *Roll. Abr.* 235. *Vide Supra.* If



If he which hath Common Appurtenant to Land, demiseth Parcel of the Land to another, the Lessee shall have Common for the Beasts *Levant* and *Couchant*, *Wildman's Case* 8 R.

By Feoffment of Parcel of Land *cum pertin'* without Deed, the Common passeth as Appurtenant; and so of Part. *Jones's Rep.* 397. *Sa- cheverel's Case*. But the Case in *Cro. Car.* on a Special Verdict in Trespass, is this.

Common passeth by the Words *cum pertinentiis*.

*F.* and others were seised in Fee of the Place where, &c. being a great Waste, and in 2 H. 4. granted by Deed Indented to the Prior, &c. of *Stone*, ( who were seised in Fee of 3 Mes- suages, 100 Acres of Land, 30 of Meadow, and 50 of Pasture, in *Stallington* ) Common for him, & *omnibus tenentibus suis in Stallington pro omnibus averiis suis communicabilibus omni tempore anni in predicto vasto*, *Habend'* the said Common of Pasture to the said Prior and Convent & *Successoribus & tenentibus suis imperpetuum*; the Priory being dissolved, the King grants the said Tenements with all Commons thereunto Appertaining to *R. H.* and his Heirs, who by Feoffment conveys 33 Acres, Parcel of those Tenements, *cum pertinentiis* to the Defendant, who therefore justifies the using of the said Common Appurtenant. *Resolved*, That this Common created in 2 H. 4. and so within Time of Memory, may be said Common Appurtenant, and may pass by Feoffment, as Common Appurtenant, together with the said Tenements; and it was *Resolved*, Tho' but Part of the Land be conveyed, yet it is Common Appurtenant, as Common for the Beasts *Levant* and *Couchant* upon the said Tenements, and shall well pass by the Words *cum pertin'*, and so may well be apportioned. *Cro.*

Upon Grant of Part of the Land over, the Common is not extinct, but apportioned.

*Cum pertinentiis.*



## The Law of Commons.

Car. 482. Sacheverel and Porter. 1 Rob. Abr.  
234. Mesme Case.

*Where Common shall be extinct by Purchase of the Land out of which, or Parcel of it, by Alienation of the Land, or Parcel of it, or not; and where it shall be suspended.*

By Purchase  
of Parcel of  
the Land out  
of which, &c.  
Common Appendant.

Unity of Possession of the entire Land to which, &c. and of the intire Land in which, &c. makes an Extinguishment of Common Appendant, as *Bradshaw's Case*, in *Tirringham's Case*. N. B. was seised of the Place where, &c. in Fee, and G. F. was seised in Fee, of an House and 20 Acres of Land in *A. præd'*, and that the said G. F. and all those whose Estate, &c. have had for him, his Farmers and Tenants, Common in the said Place where, &c. and that G. F. enfeoffed of the said Tenement the said N. B. and N. B. let to the Defendant the said House and 20 Acres of Land, with all Common appertaining & *usitat' cum prædicto Messuagio*. This Common is extinct by Unity of Possession, and cannot be revived again by these Words. So it is of Common Appendant; but by the Words of the Lease, it is a new Grant. 4 Rep. 38. a. *Tirringham's Case*.

Regul 1.

The Rule is, *Unity of Possession of so high and perdurable Estate, of the thing claimed as of the Land out of which it is claimed, by Prescription, shall destroy the Prescription*; because it is an Interruption in the Right; but Prescription or Custom cannot be lost by the Interruption of the Possession for 10 or 20 Years. If a Parson hath Common Appendant to his Parsonage  
out

out of the Lands of an Abbey, and afterwards the Abbot hath the Parsonage appropriated to him and his Successors, in that Case the Question was, If the Common were extinct? *Dyer* was of Opinion that it is; because he hath as high an Estate in the Common as he hath in the Land: But *Wyndham* and *Mead contra*; that the Abbot has not as perdurable an Estate in the one as in the other; for the Parsonage may be disappropriated, and then the Parson shall have the Common again, like the Case of a Nuisance, 21 *Ed. 3. 2.* Assize of Nuisance was brought for straitning a Way, which the Plaintiff ought to have to a Mill; the Defendant alledged Unity of Possession of the Land and of the Mill in *W.* and demanded Judgment: The Plaintiff said that after that, *W.* had two Daughters and died seised, and the Mill was allotted to one of them in Partition, and the Land to another, and the Way was reserved to her that had the Mill; and the Assize was awarded; and so by Partition the Way was revived and appendant as it was before, and yet *W.* the Father had as high an Estate in the Lands as in the Way.

The Plaintiff replies to an Avowry for Damage-Feasant; that *J. S.* seised *de virgata terræ in A.* and that he and all those whose Estate, &c. have used to have Common of Pasture, *pro omnibus averiis levan' & cuban' super virgat' terræ in loco vocat' D. quando jacet friscus*, and pleads a Feoffment of the Moiety of the Virge of Land to himself, by which he put in his Cattle: The Defendant demurs.

*Walmesley* and *Owen* held this to be Common Appendant and Common Appurtenant.

## The Law of Commons.

Common Appurtenant is, and therefore may not be determined by Division of the Land. *Anderson* and *Beaumont* took this to be Common Appurtenant, as it is alledged in the Prescription, and then being without Rate, the Division of the Land determines the Common. *Co. Lit.* 114. *b. Godb.* p. 4. *Mo.* p. 463. *Smith* and *Bowfall*.

Declaration.

The Plaintiff in an Action on the Case intitles himself by Prescription to a Fold-course for Sheep upon all the Lands in such a Field on *Michaelmas-day*, and so to *Lady-day*, the Lands being unsown; and for that the Defendant put on Sheep, &c. before *Michaelmas-day* and after, and thereby fed the Grounds, the Plaintiff could not take so good Feed, *per quod actio*, &c. By *Hale*, *Norf. Summer-Affizes*, 1698. 1. The Owner may put on Sheep and feed his own Grounds before *Michaelmas*, unless a Custom be to the contrary, which ought to be laid in the Declaration. 2. It appearing that Part of the Lands, &c. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no Exception of those Lands in the Prescription, the Plaintiff was nonsuit; for as to those Lands the Prescription is gone by Unity of Possession.

Prescription  
gone by Uni-  
ty of Posses-  
sion.

Shack.

But *Shack-Common* shall not be extinct by Unity of Possession. *Vide infra*.

Abbot of *D.* was seised of a Common out of the Lands of the Abbey of *S.* as Appurtenant to certain Lands of the said Abbey of *D.* The House was dissolved, and the Possessions thereof given to the King by Act of Parliament, *Habund* in as large and ample Manner,

&c.



*&c.* The King grants the Possessions of the said Abbey of *D.* to *A.* and the Possessions of the said Abbey of *S.* to *R.* *Per Cur'.* The Common is extinct and not revived by Unity of Possession; for the Words of the Declaration shall be construed according to Law, and by the Law, the Common shall not remain against the Unity of Possession.

By Purchase of Part of the Land in which, *Common Appendant, by Purchase of Parcel of the Land in which. &c.*  
*&c.* Common Appurtenant is all destroyed; but by Alienation of Part of the Land to which, *&c.* the Common is apportionable: *Vide supra* 97. And if a Man make a Feoffment of Land in which he had Common Appendant, this shall extinguish the Common perpetually. If he which has Common Appendant purchase the Land out of which this issues, in Fee, the Common is extinct by this. *Tirringham's Case, and Wiat Wild's Case. 1 Roll. Abr. 932. Cateby's Case, Rol. 935.*

If he which had Common in Gross purchase Common in the Land out of which this issues, the Common is extinct. *7 H. 6. 3.*

If the Lord of the Manor who had Common *de jure* in his Wastes, alien the Wastes, this shall extinguish his Common. *18 Ed. 3. 44. 18 Aff. p. 4.*

If a Man be seised of Land to which Common is Appendant, and is disseised of the Common, upon which he brought an Assize, and after he enfeoffs another of the said Land, the Common is extinct for ever. *5 Rep. 101. 4.*

Shack Common (the Nature of it, *Vide supra*) or mutual Common, in regard that I have Common in your Ground, that you shall have  
*Shack Common.*



## The Law of Commons.

have Common in mine, shall not be extinguished, by the Unity of the Possession, for the Necessity of the publick Good to use without Inclosure. 1 *Roll. Abr.* 935. Bishop of London's Case.

*Estovers.*

If the Owner destroys the House, the *Estovers* is gone, for the Prescription is annexed to the House. *Winch.* p. 45.

One had Common in a great Field wherein many Men had Land; he purchased an Acre from one of them: It was adjudged, that all his Common was extinct; but the principal Case was adjudged on a Point of Pleading. 1 *And.* 159. *Cro. Eliz.* 594. 1 *Leon.* p. 43. Case 56. *Kimton and Bellamy.*

By Inclosure.

If a Commoner inclose part of the Waste out of which he had Common issuing, this suspends his Common. *Pasch.* 1 *Jac.* *Bradshaw's Case.*

Purchase of the Approvement doth not extinguish Common.

If the Commoner purchase a Part approved, his Common shall not be extinct in the Residue. As one had Common Appendant to his Tenement in a great Waste, and the Lord improves Part of the Waste, leaving sufficient Common in the Waste; and after he enfeoffs the Commoner of the Improvement; this does not extinguish his Common in the Residue. *Dyer* f. 339. pl. 45.

Extinct by a Release of Common in Part of the Land.

By a Release of Common in Part of the Land, it is extinct in the Whole: The Case was, In Trespass, the Defendant pleads that *W. G.* his Father, was seised in Fee of a Tenement in *L.* and that he and all his Ancestors, and all those, &c. in the said Tenement from the Time whereof, &c. have used to have Common in the Place where, &c. for all their Beasts *Levant* and

## The Law of Commons.

27

and *Couchant* upon the said Tenement, and that it descended to him; and Issue was taken on the Prescription, and a Verdict finds *E. G.* (the Defendant's Grandfather) was seised of the Tenement) and had Common (according to the Prescription) and he being so seised released to Sir *T. R.* the Plaintiff's Ancestor, all his Right and Common in Part of the Land where he had the Common, and died, and the Tenement descended to *W. G.* and from him to the Plaintiff. It is extinct in all; by 2 *Judges*; for the Common is intire through the whole Land; wherefore a Release in part shall discharge the whole. *Walmesly* held the Common was not gone for the Residue, because this Release went in Benefit of the Ter-tenant, and is *quasi* an Improvement. But because the Prescription was general, to have Common in all the place where, &c. and the Jury have found a Release in Part of the Land, the Prescription is found against the Defendant. *Cro. Eliz.* 593. *Rotheran* and *Green* 2 *Anderson* 89. *Mesme* Case.

Prescription.

Copyholder had Common in the King's Waste in a Forest, and in the Waste of other Freeholders, and after the Manor comes to the King by Dissolution, and he grants the Manor; the Common in the Land of the Freeholders is not extinct, but in the King's Waste it is. *Jones's Rep.* 349.

Extinct in the King's Hands.

In Common *pur Cause de Vicinage*, if one inclose Part, it is an Extinguishment of all the Common. 1 *Brownl.* 174. *Bacon* and *Palmer's* Case.

Common *pur Cause de Vicinage*.

In *Replevin*, The Defendant saith, The Place where is 18 Acres of Freehold of *J. D.* and justifies

By Entry into Part of the Land in which, &c.

## The Law of Commons.

justifies as Servant to *J. D.* Damage-Feasant: The Plaintiff saith, That long time before, &c. one *P.* was seised of a Messuage, and 100 Acres of Land, and that he and all those, &c. had used to have Common in the said 20 Acres; and that *P.* 19 *Jac.* leased the said Manor to the Plaintiff for so many Years yet in being, and so had the Common till the Defendant did the Wrong. The Defendant saith, That the 20 Acres are the Freehold of *J. D.* and Parcel of a great Waste called *Hill*, and the Plaintiff entred into one Parcel of it, and by this he pretends the Common is gone. And the Plaintiff demurred for three Causes.

Suspension.

Pleading.

1. It does not appear when the Inclosure was, and it may be it was before the Lease made to the Plaintiff, and then he cannot lose the Common, for then he had nothing in it. 2. They say, the Plaintiff entred into the Land, and do not say disseised; and a naked Entry is but a Trespass; and if he which entred had Common, it is no Trespass, and the Common cannot be suspended. 3. We claim in 20 Acres, and he saith the 20 Acres is Parcel of *Hill*, and we entred into Part of *Hill*: This may be another Part than that in which we claim Common. 2 *Roll. Rep.* 345. *Higgs and Henwood's Case.*

Suspension.

If Common Appendant to Abbey Lands were perpetually suspended before the Statute, it shall be perpetually extinct afterwards. 2 *Roll. Rep.* 257.

Entingishment of Common, how to be pleaded. *Vide infra tit. Pleading.*

Suspension of Common, no Plea to an Action of Debt for Rent. *Vide infra tit. Pleadings.*

Of



Of Common being lost by the Extinguishment of Copyhold Estates.

Common which was first gained by Custom, and annexed to the customary Estate, is lost when the Copyhold is extinct and infranchised; for the Common is not in its own Nature incident to a Copyhold Estate, but a collateral Interest gained by Usage. Therefore, a Copyholder of a Messuage and two Acres of Land for Life, had Common in the Lord's Waste: The Lord grants and confirms the said Copyhold Messuage and Lands *cum pertinentiis*, to him and his Heirs. The Question was, Whether he should have Common still? *Per Totam Cur'*. He should not. Custom hath annexed the Common to his customary Estate, which being infranchised, determined, and destroyed by his own Act, in making it a Freehold, the Common is also destroyed, and cannot continue without Special Words. And the General Words *cum pertinentiis* will not help. *Yelv. p. 190. Cro. Jac. 253. Marsham and Hunter's Case, Noy 136. Mesme Case.* So was the Case of *Forth and Ward*, where a Copyholder had used to take *Estovers* to repair his Hedges; and the Lord granted to him the Freehold of the Copyhold, by the words of Grant unto him all the Lands, Tenements and Hereditaments thereunto appertaining, and therewith used and occupied: It was resolved, He should not have Common in the Land of the Lord. *2 Brownl. 209. Marsham and Hunter's Case, Moore 866. Forth and Ward.* The Words *cum pertinentiis* do not create a Common. A Copy-

Where Copyhold is extinct Common is lost, tho' the words *cum pertinentiis* be in the Grant.

Of Common in reference to Copyhold.



Diversity.

Copyholder claims Common in another Man's Land, and the Lord enfeoffs the Copyholder of his Copyhold Land; he hath now lost his Common; but if a Copyholder hath Common in the Lord's Waste, and the Lord enfeoffs him of the Copyhold with all his Commons; the Common is not gone. 1 *Brownl.* 173. *Lee and Edward's Case.* Note, The Words *And all Pastures and Commons whatsoever* to the said Messuage, or Tenement belonging, or used, or demised with the same; and it is intent, that a like Common shall be granted. 2 *Anderson* 168. *Worley's Case.*

See also the Case of *Crowder ver. Oldfield Hill.* 4 *Annae B. R. Salk.* 170. where 'twas held, That a Copyholder who has Common of Pasture in the Lord's Wastes out of the Manor has the same as belonging to his Land, whether Freehold or Copyhold, and therefore if he enfranchise the Copyhold, the Common still remains, and in Pleading he is to make his Title thereto in the Lord, viz. That the Lord of the Manor, Time out of Mind, had Common in such a place for himself and his customary Tenants, &c. *Vide Co. Ent.* 9, 10. But where a Copyholder has Common in the Wastes within the same Manor, such Common belongs to his Estate, (as it is Copyhold) and therefore if the Estate be enfranchised the Common is extinct. *Vide Salk.* 366. and the Cases there cited, where 'tis said by *Holt Ch. J.* (on shewing that all the Precedents of claiming Common were, *ad Tenementa sua spectant*.) That Common may be said to belong to the Copyhold Tenement, since it belong'd to the Copyhold Estate. For what belongs to the Estate belongs to the

the Tenement. *Mes nemy vice versa, come  
semble per le Cases supra. Tamen Quære.*

If *A.* has Common in the Lands of *B.* as Appurtenant to a certain Messuage and 20 Acres of Land, and *B.* enfeoffs *A.* of the Lands in which, &c. whereby the Common is extinguished, and afterwards *A.* leases to *B.* the said Messuage, and 20 Acres of Land, with all Commons, Profits and Commodities thereunto belonging, *vel occupat' vel usitat' cum præd' Messuagio*, this is a good Grant of a new Common for the Time. For though it were not Common while in the Hands of the Lessor, yet it is now granted *quasi Common* to be used with the Messuage Land, &c. And although it be not the same Common as was used before, yet it is the like Common. *Trin. 39. El. Bradshaw and Eyre. Cro. El. 570. per Cur'.* But yet, for that it was not averred, that this Common was therewith used at the Time of the Lease, it was adjudged against the Defendant who claimed the Common. *Vide ibid.* See also *Cro. El. 794. 2 And. 168.*

The Abbot of *F.* was seised of a Manor, and there was a Prescription for Common in the Waste of the Manor, as belonging to every Ancient Tenement. King *Hen. 8.* granted the Manor to Sir *J. G.* which came to Sir *T. G.* who was Plaintiff in the Trespass. The Defendant justifies by an *Usitatum fuit*, yet it had been there used Time out of Mind, that every Tenant for Years of an ancient Tenement and Close within the said Manor, used to have Common of *Turbary* on the Waste of *Turbary*. the said Manor; and that the Tenement and Close he now hath is an ancient Tenement,  
and

Common of  
Turbarry.

Pleadings by  
an *Usitatum*  
*fuit* annexed  
to the Estate  
of a Termor  
is not good.

How a Ter-  
mor pre-  
scribes.

and was granted to him with all Common Appurtenant to the said Messuage and Close or accepted or reputed as Part, Parcel, or Member of the same. And the Question upon a Special Verdict was, When the Lord of the Manor is seised of a Waste, and a Tenant of an ancient Tenement prescribes to have Common in the Waste of the Lord; afterwards the Tenement is severed from the Manor, and granted for a Term to the Defendant, with all Commons Appurtenant to the said Messuage and Close, whether this Common that was before belonging to this Ancient Tenement, shall pass to the Grantee? *Per Cur'*, This Prescription, as it is here laid with an *Usitatum fuit*, is not good. It was agreed, That if a Copyholder doth purchase the Inheritance of his Copyhold, and afterwards grants this with all Commons belonging to the same; the Common that was before used with the Copyhold shall pass to the Grantee. But the Pleading here is not good. The beginning of this Common was by Grant, and by Permission of the Lord, and this for the Advancement of his Tenant, and not by Prescription, and he hath no Remedy for this, but only in Equity. *Per Williams*, A Termor may prescribe, but not in his own Name, but in the Name of his Lord, that he hath had for himself and his Farmers, &c. Had it been laid here, with all Commons, Profits, &c, used, occupied and enjoyed with the Tenement by the Farmers, this with an Averment had been good, but not as it is here: The Grant is here with the *Usitatum fuit*. Now here the *Usitatum est* is annexed to the Estate of the Termor; which is  
not



not good. 1 *Bulstr.* 17, 18. 7 *Fac. Grymes and Peacock's Case.*

Lessee for Years cannot alledge an Usage; for every *usitatum* ought to go in one self-same Current not interrupted, as in the Case of a Copyhold. But it might pass by apt Words. 2 *Brownl.* 222. *Mesme Case, vide p. 58. b.*

One had two Manors, *viz. Dale and Sale*: Common of The Copyholders of *D.* have usually Com. Copyholders mon in the Manor of *S.* & *contra.* Afterwards extinct. the Lord sells both the Manors. The Copyholders of the Manor of *D.* die, and others are admitted; they may not claim the Common that the others had, for it is extinct by Alteration. *Quer.* 1 *Bulstr.* 19. in *Grymes's Case.*

*Suspension and Reviver.*

If the Commoner take a Lease of any Part of the Land in which, &c. all the Common is suspended. As if a Man hath Common by Prescription, and takes a Lease of the Land for 20 Years, whereby the Common is suspended, after the Year ended he may claim the Common generally by Prescription; for that the Suspension was but to the Possession, and not to the Right, and the Inheritance of the Common did always remain: And when Prescription, or Custom doth make a Title of Inheritance, the Party cannot alter, or wave the same in *Pais.* 1 *Inst.* 114. *b.* *Co. 9 Rep.* 135.

By Lease of any part of the Land in which all the Common is suspended. When Prescription doth make a Title of Inheritance, the Party cannot wave the same in *Pais.*

If a Commoner inclose Part of the Waste, Suspended by out of which the Common is issuing, this Inclosure.

I

suspends



suspends the Common. 1 Roll. Abr. 938.  
Bradshaw's Case.

Reviver.

A Common is Appurtenant to Copyhold Land which escheats, and the Lord grants all the Lands with such, or all the Commons, &c. the Common is revived. 2 And. 169.

Extinct and  
not revived  
by words *cum*  
*pertinentiis*, or  
Commons  
Appertaining.

N. B. is seised of Lands in Fee. G. F. is seised of an House and two Acres of Land, and had Common in the said Lands of N. B. afterwards G. F. enfeoffs N. B. of the said Tenement and two Acres of Land; and the said N. B. demiseth to J. the said Tenement and two Acres of Land, and all Commons appertaining, or used, or occupied therewith, &c. this Common is extinct and not revived. But it may amount to a good Grant of Common for the Time. Cro. El. 570.  
Bradshaw's Case.

A Case was moved in Godbolt's Reports. If a Parson hath Common Appendant to his Parsonage, out of the Lands of an Abby, and afterwards the Abbot hath the Parsonage appropriated to him and his Successors; whether the Common be extinct? Which was affirmed by two Justices against Dyer, (who held the Common to be extinct, because he hath as high Estate in the Common as he hath in the Land,) That the Commoner hath not as perdurable Estate in the one as in the other; for the Parsonage may be disappropriated, and the Parson shall have the Common again. Godb.

p. 4.

Pleadings.

Pleadings.

Avowry Damage-Feasant. Bar' Qd quer  
feistus de M<sup>el</sup>. & terris habuit commu-  
niam in Pastura parcella campi quo-  
libet anno quo campus fuit semina-  
tus cum p<sup>is</sup> a festo ad festum. 3 Brownl.  
302.

Repl' Qd B. fuit feistus de Manerio  
unde Pastura in qua est parcella. Et  
R. feistus de p<sup>re</sup>d<sup>o</sup> M<sup>el</sup>. & terris Tene  
de Manerio in socagio. Et R. intra  
tempus memorie feoffavit B. de M<sup>el</sup>. &  
terr<sup>is</sup> p<sup>re</sup>d<sup>o</sup> & B. postea feoffavit Des.  
de Manerio, Et sic communia est ex-  
tingta per unit. de possess.

Simile advocare. Bar' Qd Defend  
feistus de M<sup>el</sup>. & terris habuit com-  
muniam, &c.

Repl' Qd Locus in quo, &c. jacet in  
communi campo in quo sunt alie terre  
in quibus fuit communia Pasture de 2  
acris quarum terrarum un M. feistus  
feoffavit quer Demurrer inde. Hern:  
678.

## C H A P. XIII.

*Of Grant of Common. What Common is grantable over and what not. Where Common Appurtenant may be granted over, or not. By what Words Common shall pass, either Ancient Common, or Common de novo. Where it shall pass with the Words cum pertinentiis, or not. What Words amount to a Grant of Common. And what Words enure as a new Grant, though the Common be extinct or not. Where Common shall pass by Grant of the Manor, or Lands in which, &c. The Exposition and Extent of a Grant of Common. Common, how to pass by Deed, or without Deed. Where a Grant of Common shall be good by relation to a precedent Bargain or not. License to common.*

*And first, What Common is grantable over, or not; or may be severed from the Manor.*

*Common Sans  
Number.*

**A** Common without Number in Fee, is grantable to another; for the Word *Heirs* implies Assignees. But by *Rolle*, Common without Number may not be granted over, for it is a Common in Gros. 21 Ed. 4. 84. 2 Roll. Rep. 73.

*Estovers un-  
certain.*

But Common for Life, or Years, without Number is not grantable, for this may be a Prejudice to the Tenant of the Land. 8. Ed. 4. 17.

*Estovers*

*Eftovers* uncertain, (*viz.*) So much as I shall use in my Chimney, are not grantable over. 22 Ed. 4. 6.

A Commoner may not grant over his Common, except he grant over his Tene-ment; for they may not be severed. And so is *Nevil's Case* in the *Commentaries*: For the Prescription is annexed to the Land, and in case of *Eftovers* to the House. *Winch*: p. 45.

A Man prescribes to have Common Appurtenant to the Manor of B. for all his Beasts *Levant* and *Couchant* upon it, he grants this Common to A. *Per Cur'*, He cannot grant it over, for he hath it *quasi sub modo*, (*viz.*) for the Beasts *Levant*, &c. but Common Appurtenant for Beasts certain may be granted over. So *Spooner* and *Day's Case*: A. prescribes for a Fold-course, (*viz.*) Common of Pasture for any Number of Beasts not exceeding 300, in a Field Appurtenant to a Manor; he may grant over this Fold-course to another, and so make it a Common in Gross, because the Common is for a Number certain; and by the Prescription the Sheep are not to be *Levant* and *Couchant* upon the Manor, and so may be severed from the Manor without Prejudice to the Owner of the Laud. *Cro. Jac.* p. 15, *Drury* and *Kent's Case*. 1 *Roll. Abr.* 402. *Spooner* and *Day's Case*, 232. *Mesme Case*.

Where Com-  
mon Appur-  
tenant may be  
granted over,  
and where  
not.



By what Words Common shall pass, and that in respect of Ancient Common, or a Grant de novo.

An Ancient Common may be in *Esse*, or extinct,

As to Common in *Esse*, how and by what Words it shall pass; and of the Exposition and Extent of the Words.

Where *cum pertinentiis*, will carry the Common without special Words or not.

Copyhold.

How in case of Copyhold.

Common shall pass with the Words *cum pertinentiis*. *Sed distinguendum est*. Where a Common is extinct, there it shall not pass, or be revived by the Words *cum pertinentiis*, as in *Marsham* and *Hunter's Case*. A Copyholder for Life had Common in the Lord's Waste; the Lord grants and confirms the said Copyhold, Messuage and Land *cum pertinentiis*, to him and his Heirs. *Per Cur'*. This Purchaser shall not have Common there as the Copyholder had, *Vide supra* in the Sect. before. So *Forth* and *Ward's Case*, a Copyholder had used to take *Estovers* to repair his Hedges; and the Lord granted to him the Freehold of the Copyhold, by the Words of *all the Lands and Tenements thereto appertaining, and therewith used and occupied*. *Per Cur'*. He shall not have Common in the Land of the Lord. So in the principal Case, for the Words *cum pertinentiis* shall not create a Common: And the Defendant justified in Trespass for using the Common, by Reason of Confirmation, and adjudged against him on a Demurrer. But it's said it was agreed in *Grymes* and *Peacock's Case*. 1 *Bulstr.* 17, 18. That if a Copyholder does purchase the Inheritance of his

his Copyhold, and afterwards grants this with all Commons belonging to the same; yet the Common, which was before used with the Copyhold, shall pass to the Grantee. Though I conceive the Reporter is mistaken in that Point; but the Case fell off, because the Pleading was by a Lessee, with an *usitatum est*, which cannot be good, as annexed to the Estate of the Termor. *Vide supra*. *Brownlow* saith, The Judges gave not any absolute Opinion in the first Point: If there be a Common Appurtenant to a Copyhold Tenement, and the Lord makes a Feoffment of the Tenement with all Profits, Commodities and Common to it appertaining: Yet the Feoffee shall not have any Common, for this was Appurtenant to Copyhold, and not to Freehold. 1 *Bulst.* 2. *Cro. Jac.* p. 253. *Marsham* and *Hunter's Case*, *Yelv.* p. 189. *Mesme Case*. 1 *Bulst.* p. 19. 1 *Bulst.* 17, 18. *Grymes's Case*, 2 *Brownl.* 222. *Mich.* 10 *Jac. B. R.*

A Common may be granted, and pass by the Name of Tenements and Hereditaments; and shall be construed as a thing occupied, and enjoyed with, &c. 8 *Rep.* Sir *H. Finches's Case*. Common may pass by the Name of Tenements and Hereditaments.

If Part of the Land is conveyed, to which Common is Appurtenant, and not the intire; yet Common shall pass by the Words *cum pertinentiis*, and shall be apportioned, and may pass by a Feoffment, together with the said Tenements. *Vide supra*, *Cro. Car.* 482. *Sacheveril* and *Porter's Case*.

So Commoner for an House and 20 Acres of Land, had Common in all the Lands of *B.* and he infeoffs the said *B.* of the House and

## The Law of Commons.

What Words  
amounts to a  
Grant of the  
Common.

Pleading.

Copyhold.

What words  
enure as a  
new Grant,  
the Common  
be extinct.

Land to which, &c. B. afterwards lets to J. S. the said House and Land, with all Commons, Profits, and Commodities appertaining, *vel occupat' vel usitat' cum prædicto Messuagio. Per Cur'.* This Common Appurtenant (and so it is of Common Appendant) is extinct by Unity of Possession: But the Court held, That by the words of the Lease of all Commons, Profits, &c. occupied, or used *cum Messuagio, &c.* it's a good Grant of a new Common for the Time; for though it were not a Common in the Hands of the Feoffor, yet it is *quasi* Common used therewith. And though it be not the same Common it was before, yet it is the like Common: But because there was not a sufficient Averment, That this Common was used by the Lessor at the Time of the Lease, it passed not. Much like this Case is that of *Worley and Kingsmill*, A Copyholder of a Manor, which had Common by Prescription in 60 Acres, Parcel of the Demesnes of the Manor escheated, and the Lord by Deed granted it to another in Tail *per nomina, &c. Communiarum quarumcunque dicto Messuag' sive Tenemento spectan' sive in aliquo modo pertinen' vel cum eodem Messuagio dimisso usitat. Per Cur'.* The Grantee in Tail, shall have such Common as the Copyholder had; though the Ancient Common which was by Prescription, is determined by Unity of Possession in the Lord. But the Grant shall enure as a new Grant of the same Common. *Cro. Eliz. 794. Worley and Kingsmill's Case, 2 And. 169. Mesme Case.*

One claimed Title to a Common as Abbot in a Forest; but by the Dissolution there was an



an Unity of Possession, and that destroys the Common; and then Common is not revived by general words of *Tot, talia, tanta Libertates, &c.* but it's otherwise in the Case of Copyholders. *Vide ante Jon. Rep. 285, 286, 287.* Common not revived by general words *Tot talia tanta Libertates, &c.*

Sir R. G. was seised of divers Tenements called *Hingell-Hall* in *L.* and of a Moor called *Kingsly-Moor* in *D.* and the Tenants of Sir R. G. have used to have Common in the said Moor; and Sir R. G. being seised, did demise the said Tenements to *K.* for her Jointure by these words, By the Name of *Hingell-Hall*, and certain Land, Meadow and Pasture in Certainty, and with all Lands, Tenements and Hereditaments to that belonging, or with that occupied, or enjoyed, now, or late in the Tenure of one *N.* and *N.* was Tenant of the said Premises, and had Common in *Kingsly-Moor*. The Question was, If *K.* by this Demise shall have Common in *Kingsly-Moor*, or not? If it were taken to be a Common, it did pass. But by *Coke*, This is only a Feeding, and not an Hereditament; and if so, it shall be intended the like Feeding that the Tenant hath. *Quar. 2 Brownl. 52. Hargrave's Case.*

With all Lands Tenements and Hereditaments is Common Pasture.

One grants to a Man and his Heirs Common as Appurtenant to his Manor of *F.* to common in such a Moor, &c. by this Grant the Grantee shall have Common Appurtenant to this Manor; and if he makes a Feoffment in Fee, or for Term of Life, of the Manor, the Feoffee, or Lessee, shall have this Common. So it is of Common of *Estovers* or *Turbary*. Note, Common Appurtenant to a Manor, Grant of Common Appurtenant to a Manor. Common Appurtenant may be by Grant, by Deed since time of Memory.



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a Manor, may be by Grant by Deed, since Time of Memory; and this as well for Beasts certain, as Beasts without Number. So is *Rolle, Fitz. N. B. 180. n.*

Grant *de novo* of Common will pass by Grant of the Manor.

If at this Day a Grant *de novo* be made of Common of Pasture for Beasts *Levant* and *Couchant* on his Manor of *Dale*, or Common of *Estovers*, or *Turbary* in Fee, to be used or spent within his Manor; these are Common Appurtenant, and will pass by Grant of the Manor. *1 Inst. 121. b.*

But if *A.* seised in Fee of *Black Acre*, and *W. Acre*, grants *Black Acre* to *C.* with Common for the Beasts *Levant* and *Couchant* upon *W. Acre*, this is not good without Deed. *2 Roll. Abr. 63. Tanner and Hobb's Case.*

Apportionment of Common Appurtenant *de novo*.

If *A.* being seised of 100 Acres of Land, to which Common for Beasts *Levant* and *Couchant* upon the Land is Appurtenant, and by Grant within the Time of Memory, grants 10 of these Acres only, without saying *cum pertinentiis*; yet a proportionable Common for Beasts *Levant* and *Couchant* upon these 10 Acres shall pass, inasmuch as it is Appurtenant to the said Acres, and the Common is to be apportioned. *2 Roll. Abr. 60. Sacheverel and Porter's Case.*

By the Grant of Lands and Tenements, and Pastures, Common in Gross shall not pass.

By the Grant of all Lands and Tenements, Common in Gross shall not pass; and Common in Gross shall not pass by the Grant of all his Pastures. *2 Roll. Abr. 57.*

## Exposition and Extent,

Fine.

One seised of the Manor of *C.* and of 42 Acres, Parcel of the said Manor (where the Tref-

Trespass was, ) and of a Messuage, and two Yard-Lands Parcel of the said Manor, levied a Fine of the said Messuage, and two Yard-Lands to the Defendant, and granted them to the Defendant and his Heirs; and further, by the said Fine granted to him Common for 4 Horses, 5 Beasts, and 200 Sheep in the said Manor and Lands in C. This Plea is good, though he doth not plead that it was Waste or Common. For by the Plea (as the Fine is) he may claim Common in any part of the Manor; for there is not any Restraint as to the Waste or Common. *Cra. Car. 599. Strange's Case.*

If a Man grant Common to another for his Beasts through all the Manor; yet he may not common in the Garden of the Grantor Parcel of the Manor, but only in such place where a Man of common Right ought to common, nor in Land sowed, nor with Beasts not commonable. *9 H. 6. 36. 3 Leon. 250 Finch. 158.*

Grant of Common through all his Manor, extends not to Garden, nor to Beasts not Commonable.

If a Man grants Land to one *cum Communia in omnibus terris suis, &c.* and does not express any place in certain; he shall have Common in all Lands which he had at the Time of the Grant: But if I grant Common to another for Years, and do not declare in what place he shall have it, it's void. *1 Bulstr. p. 18. Fitz. N. B. 180.*

Grant of Common and expresseth not any Place certain.

Grant of Common to a Man *ubicunque averia sua ierint*, how it shall be expounded. *6 Rep. 64. 2 Rep. 32.*

If a Man grant Common newly created, *quandocunque averia sua ierint*, the Grantee shall not have Common there, but in this very Manner. *1 Rep. 87. a. in Corbet's Case.*

A Man

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A Man grants Common newly created *Quandocunque averia sua ierint*; this is *modus Donationis*, and the Grantee shall have Common there, but in this manner, as it is here expressed.

If a Man grant to me Common for my Beasts *ubicunque averia mea ierint*, if the Beasts of the Grantor never depastured in any place before the Grant, or at the Time of the Grant, or after, the Grantee shall not have any Benefit by the Grant. But upon such a Grant of Common, if the Grantor depastured his Beasts at the Time of the Grant, or after, in any place, the Grantor may common there also. 9 H. 6. 36.

If a Man grant Common to another, *ubicunque averia sua ierint*, and after he occupy and manure an 100 Acres of Land with his Beasts, and after he is so poor that he has not any Beasts; yet the Grantee shall have Common in the 100 Acres. Yet it's said in *Latch*, in *Whiston* and *Weston's Case*, (in the Argument of that Case,) If a Man grant Common *quandocunque averia sua ierint*, and after the Grantor had no Beasts, the Grantee shall not have Common, because the Time that the Grantor had Common is material. *Latch*. p. 90.

And upon such Grant of Common *ubicunque averia* of the Grantor *ierint*, if the Grantee put in his Beasts into his Garden or Corn, the Grantee may put in his Beasts there also. 9 H. 6. 36.

But in Case of such a Grant of Common, if the Grantor die; it is made a Doubt in that Book, if the Grantee shall have Common after his Death. Now



## The Law of Commons.

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Now in the Grant of Common *ubicunque & quandocunque averia sua ierint*; he ought to aver in Pleading, That the Cattle of the Grantor went in the same place. Justice *Berkley* held the Clause of *quandocunque averia sua ierint* is not good, because it restrains all the Effect of the Grant; for if the Grantor will not put in his Cattle, he shall never have Common. But it was well answered, That *modus & conventio vincunt Legem*. Therefore, he that grants Common *quandocunque averia sua ierint*, may till the Land, or let it lie fresh, and the Grantee has no Remedy. *Cro. Car.* 599. *Stringer's Case, Hob. p. 40.*

If a Man grant Common without Number, the Grantee may not put in so many Beasts, but so that the Grantor may have sufficient Common in the said Land. *12 H. 8. 2.*

If a Man grant Common for all manner of Beasts, he shall not have Common for Pigs and Goats; yet if a Man grant Common for all manner of Beasts, except Goats, he shall have Common for Hogs, because of the particular Exception. *2 Roll. Rep. 280.*

*Note,* One cannot improve against his own Grant, though it be to a certain Number. *1 Keb. 430.*

A Grant of Land with Common, or *Estovers* to be burnt: If he let the Land, the Common or *Estovers* will not pass without Deed, and express Words therein, because they be Profits. *Aliter* of a Way. *Cro. Jac. 190.* in *Bendly* and *Brook's Case*.

Com-



*Common how to pass with Deed or without.*

As to common passing with the Grant of the Land to which, &c. *Vide supra.*

Pass without  
as Appurte-  
nant to Deed,  
though not  
created *san*  
*Deed.*

A Common shall pass without Deed as Appurtenant to Land, though it cannot be created without Deed. *Sachaverel and Porter.*

A Common passeth not without Deed, because it lies in Grant, and not in manual Occupation, i. e. it may not be created without Deed. *Dr. and Stud. fo. 18. a.*

Grant of  
Common *de*  
*novis sans fait*  
not good.

If *A.* seised in Fee of *Black Acre* and *White Acre*, grants *Black Acre* to *C.* with Common for the Beasts *Levant* and *Couchant* on *White Acre*; this is not good without Deed. 2 *Roll. Abr.* 63. *Tanner and Hobbs's Case.*

Difference be-  
tween Grant  
of Common  
and Grant of  
Pastures.

If *A.* seised of Land in Fee, grants the Pasture of the Land to *B.* for Years, and *B.* license *C.* to put in his Beasts; this Lease of Pasture is good without Deed, and the License also. For this is a Lease of the Land to Pasture, and not like to Common of Pasture. Otherwise, had it been if he had granted Pasture for certain Beasts. *Mounjoy and Tierdrue*, 2 *Roll. Abr.* 62.

Where they  
shall pass with-  
out Attorn-  
ment.

If a Man who had Common of Pasture, or *Estovers* to a certain Number, grant them to another, they shall pass without Attornment. Grantee of a Common may grant it over, before any Seisin by the Mouths of his Beasts, because it is not to be taken by the Hands of the Grantee, but by the Mouths of the Cattle. 31 *H.* 8. 151. 2 *Roll. Abr.* 47.

If a Man bargain and sell *Black Acre* to *B.* and after, before the Deed enrolled, by another Deed grants Common to the said *B.* for all his Beasts which shall manure and depasture the said *Black Acre*, which he had bargained and sold to the said *B.* wherein he had mentioned it to be bargained and sold; and after the Deed is enrolled: This is a good Common Appurtenant to the said *Black Acre*, although the Grantee had nothing in *Black Acre* at the Time of the Grant; and altho' it be admitted, That this shall not relate to settle the Estate in him *ab initio*, inasmuch as it had Reference to the Bargain and Sale, and to the Estate, which he should have by Force of this. *1 Roll. Abr. 399. Gawen and Stacy's Case.*

Where a Grant of Common shall be good by Relation to a precedent Bargaine or not.

So if a Man grant Common to another, for all the Beasts which shall be *Levant and Couchant* upon the Land, which he shall purchase within a Month after, and after he purchase certain Land, this is a good Common Appurtenant to this Land, although he had nothing in it at the Time of the Grant, forasmuch as the Grant had Reference to that which he shall purchase, and it is not necessary that he should have the Land at the Time of the Grant. *1 Roll. Abr. 400. Gawen and Stacy's Case.*

Though the Grantor had nothing in the Land in which, &c. at the Time of the Grant.

So if a Man bargain and sell *Black Acre* to *B.* and after, before the Deed enrolled, by another Deed grants Common to the said *B.* for all his Beasts, which should manure and depasture the said *Black Acre*, and after the Deed is enrolled, this shall be good Common Appurtenant to the said *Black*

And tho' the Grant had not any Reference to the Bargain; yet if there were an Inception of the Estate, it shall support the Grant.

*Black Acre*, although the Grant had not any Reference to the said Bargain and Sale, inasmuch as the Grantee had a Possibility, and an Inception of an Estate, and Use in the Acre at the Time of the Grant; and it seems, this shall so relate to the Possession as sufficiently to support this Grant; for there needs not so full an Interest in this Land, to annex the Common to it. *Vide infra.*

A Grant that vests merely in Contingency not good.

But if the Grant had no Reference to any future Purchase; as if a Man grant to B. Common for all his Beasts that shall manure *Black Acre*, where he had nothing in *Black Acre*, and after he purchaseth *Black Acre*, This Grant of Common is not good, upon a Contingency, (*viz.*) if he purchase the Land. Though I conceive the Law in this Case to be otherwise. For it may be good by way of Covenant, but not to pass an Interest. *Vide infra.*

*Quere.*

License not without Deed.

One that hath Common of Pasture cannot license another to feed there, with such a Number of Beasts, without Deed; but after Verdict it shall be aided; for it shall be intended a good License by Deed, when the Defendant took Issue upon another Point, (*viz.*) the Custom. So in Replevin of 200 Sheep; The Defendant makes Conusance to one T. Lessee of A. who hath Common for all Cattle, and so justifies under him; in Bar of which the Plaintiff avers, that one *Atkins* had Common for all his Farmers and Tenants for 200 Sheep, and the Plaintiff by his License put in his Beasts being *Levant* and *Cowchant*, and on Issue joined Verdict *pro Quer'* If

Yet aided after Verdict.



If this had been demurred to, it's ill, because the License is not pleaded by Deed; neither does it appear, how the Cattle became *Levant* and *Couchant*, (but the Right of the Common is not here tried, being admitted,) and on Demurrer on this Case, the not alledging the Beasts were to compester would be fatal, and shall not be intended on saying *Levant* and *Couchant*. But being after a Verdict, shall not be intended by Wrong: And the not saying by Deed is good after Verdict, and aided by the Statute. *Gro. Jac.* 575. *Monk* and *Butler's Case*, 2 *Saund.* 326, 327. in *Hoskins's Case*. 2 *Show. Case*  
81.

One Joint-tenant grants Common to his Companion *A.* for his own proper Beasts. It's Common for a *Quære* in 1 *Keb.* whether if it be good, and if *A.* may put in such Beasts whereof he is Joint-tenant, or Tenant in Common with another? Grants of  
his own pro-  
per Beasts,  
what Beasts  
he may put in  
in or not.

If *A.* seised of Land in Fee, grants the Pasture of the Land to *B.* for Years, and *B.* licenseth *C.* to put in his Beasts; this Lease of Pasture is good without Deed, and the License also; for this is a Lease of the Lands to pasture, and not like to Common of Pasture. 2 *Roll. Abr.* 63. *Mountjoy's Case*.

He who claims Common for Beasts *Levant* and *Couchant*, may not give License to a Stranger to put in his Beasts, for that would be a Wrong to the Owner of the Soil by a Surcharge of Common; and he who has Common for 20 Beasts certain, may not license another to put in the same Number, *a fortiori* where they have Common for no certain Number. *Monk* and *Butler's Case*.

K

And



## The Law of Commons.

And an Action of Trespas brought by a Commoner against a Stranger for putting in his Cattle, &c. *Per quod Communian in tam amplio modo habere non potuit*; if the Defendant pleads a License from the Lord to put in his Cattle there, and does not aver there was sufficient Common left for the Commoners, this is no good Plea. 2 *Mod.* 6. adjudged. For tho' it may be objected that the Plaintiff may reply thereto; yet the Matter of the Surcharge and Want of sufficient Common, being the very Gift of the Action, the Defendant ought to plead thereto. 1 *Danv.* 810. *Sed Quare* 1 *Lutw.* 107.

CHAP. XIV.

*Of Prescription for Common. Where it must be laid for Beasts Levant and Couchant, and the Reason, and where it need not. The Form of Pleading Prescription for Common Appurtenant, and of Pleading Common in Gross. The manner of Pleading, in making the Title to Common. Where several Titles, or Prescriptions are to be made in Declarations and Pleas. Of Special Prescription, and the Form of Pleading. Of Prescription for a time certain. Of Shack Common. Of the Locus in quo. Of Prescription in Case of Tenants in Common. The manner of Declaring on Prescription, where Title need to be made or not. How the Declaring to be maintained by the Prescription, illustrated with several Cases.*

*What Prescription shall be good in respect of the thing prescribed for, and the Pleading.*

**A**S to Common Appendant. *Vide supra.*  
As for Common Appurtenant, as to the Form and Matter. The Form is thus,

*Where it must be said for Beasts Levant and Couchant, and the Reason, and where not.*

Common Appurtenant is only for Beasts *Levant and Couchant.* And he which claims *Couchant,* and Common Appurtenant to Land, ought to say the Reason of  
K 2 for the Pleading.

## The Law of Commons.

for his Beasts *Levant* and *Couchant*, or otherwise it is not good; because in such a Case he claims but part of the Herbage, and the Residue the Lord is to have; and then the Commoner ought to say for his Beasts *Levant* and *Couchant*; for this is the Standard of the Profit he is to have, Herbage for all his Beasts that shall be *Levant* and *Couchant* upon the Land, and not for any more; and therefore, if he put in any Beasts, that are not *Levant* and *Couchant*, he does Wrong to the Lord, and shall be punished as a Trespasser for them. 2 Saund. 325. Hoskins and Robin's Case, Noy 145. Feoffreys and Boys's Case. And therefore

If a Man claims Common by Prescription, for all Beasts commonable in the Land of another, as appertaining to his Tenement; this is a void Prescription, because he does not say, it is for Beasts *Levant* and *Couchant* on the Lands to which he claims it to be Appurtenant; for a Man cannot have Common without Number Appurtenant to Land: And when he claims Common for all Beasts commonable, and does not say, for Beasts *Levant* and *Couchant* upon the Tenement; this shall be intended Common without Number, according to the Words, for there is not any thing to limit it, when he does not say for Beasts *Levant* and *Couchant*. And therefore, in Prescription for all his Beasts *Levant* and *Couchant*, the Certainty of the Cattle need need not be expressed; as was adjudged in Parry and Walsh's Case. The Defendant justifies in Trespass, for Common of Pasture, and saith, That he was seised in Fee of one Messu-

Where the Certainty of the Cattle need not be expressed.

Messuage, &c. with the Appurtenances in G. and used to have Common for his Cattle *Levant* and *Couchant* upon the said Messuage. It was moved in Arrest of Judgment, That the Plea was insufficient, because the Certainty of the Cattle was not expressed, as for 200, and the like. But *per Car'*, The *Levant* and *Couchant* is sufficient Certainty. 1 *Roll. Abr.* 398. *Cobham* and *White's Case*, 1 *Brownl.* 198. *Parry* and *Walsh's Case*.

In an Action of Trespass, The Defendant pleads Damage-Feasant, and so *leniter chafeavit*. The Plaintiff in his Replication entitles himself to Common. The Defendant saith in his Rejoinder, that the Place where, was Parcel of a great Waste, wherein the Plaintiff had Common Appurtenant; and that the Lord enclosed the Place where, and that the Plaintiff had *tempore quo*, and *semper postea*, sufficient Common for his Sheep *Levant* and *Couchant*. It was objected, He ought to have said sufficient *ad Tenementa prædicta*, for it may be the Ground was understocked. Also it is not set forth, That he had free Egress and Regress according to the Statute of *Merton*; *sed non allocat'*; for his Sheep *Levant* and *Couchant* is intended, as many as the Land will maintain, and if there were no Egress or Regress, it ought to come on the other side. Judgment for the Defendant. 1 *Vent.* 54. *Leech* and *Widley's Case*.

But a Man may prescribe that he and all those whose Estate, &c. had Common of Pasture for 300 Sheep as Appurtenant to the said Manor, and he need not to prescribe that they are *Levant* and *Couchant*, being a certain

A Common Appurtenant for Beasts *Levant* and *Couchant* how pleaded.

Where one need not to say *Levant* and *Couchant*.



Common Appendant.

The Form of Pleading  
Common Appurtenant.

The Form of Prescription for Common in Gross.

Number limited: So it was resolved in *Noy* and *Webb's Case*; that Common Appendant unto Lands is as much as to say for Cattle *Levant* and *Couchant* upon the Land in which, &c. And there is no Difference where the Prescription is for Cattle *Levant* and *Couchant*, and for a certain Number of Cattle *Levant* and *Couchant*; but when Prescription is for Common Appurtenant to Land without alleging that it is for Cattle *Levant* and *Couchant*, there a certain Number of Cattle are to be expressed which are intended by the Law to be *Levant* and *Couchant*, and upon this Difference is grounded the true Form of Pleading; as in Common Appurtenant, a Man shall shew his Seisin in Fee of the Land to which he claims his Common, and then to say, *quod ipse & omnes illi quorum Statum ipse habet* in the same Land, from Time whereof, &c. have had Common of Pasture in the Place where, *pro averiis suis Levant & Couchant* upon the Land to which: But the Prescription for Common in Gross is, where one does not lay a Seisin of any Land, but saith, *quod ipse & antecessores sui quorum ipse hæres est*, from Time whereof, &c. have Common in the Place where, &c. *pro omnibus averiis suis*, without saying *Levant* and *Couchant*; because there is no Land upon which they may be *Levant* and *Couchant*, or to which the Common may be Appurtenant; but in the Case of the Corporation of *Derby* who prescribed for Common in Gross without Number, the Plea was held ill; because they did not say in the Prescription, that the Common was for Beasts *Levant* and *Couchant* within the Vill; but it's  
good

good after a Verdict. But on Prescription that the Borough is ancient (as *Sbrewsbury*) and that Time out of Mind, &c. this is good without *Levant* and *Couchant*, because such ancient Boroughs might have Common for many Reasons. 1 *Roll.* 401. *Day* and *Spooner.* 13 *Rep.* 66. *Morse* and *Webb.* 1 *Saund.* 346. *Mellor* and *Spateman.* *Sid.* 313. *Mellor* and *Cheadle.* 2 *Keb.* 108. 120. *Mefme* Case, 2 *Keb.* 550.

But this want of *Levant* and *Couchant* is aided after a Verdict by the Statute of *Jeofails*: It's held to be ill on Demurrer; but after Verdict is well enough. *Cro. Eliz.* p. 458. *Corbyson* and *Pearson,* *Cro. Jac.* 44. *Prance* and *Tringer.* 1 *Keb.* 190. *Buck* and *Edwards,* 1 *Sid.* 313. 2 *Saund.* 227.

And in 1 *Saund.* 325. it shall be intended after a Verdict, that the Beasts of the Plaintiff were on that part of the Land in which the Plaintiff claims Common, although there be not exprefs mention made of it, i. e. where the want of the Words *Levant* and *Couchant*, shall be aided after Verdict.

In the *Replevin*, The Defendant avowed for Damage-Feasant. The Plaintiff replies, That the Parson of such a Parish, and all his Predecessors have had, Time out of Mind, Common in the Place, &c. belonging to his Glebe; and that the Beasts of the Plaintiff were *Levant* and *Couchant* upon the Glebe, and he put them into the Common by the License of the Parson. The Defendant traverseth, That they were *Levant* and *Couchant*, and found *pro Quer.* It was moved in Arrest of Judgment, That the Plaintiff had not alledged sufficient Matter, to justifie his Beasts going in the Com-

The want of *Levant* and *Couchant* aided after Verdict.

Where Common is claimed for Beasts, *Levant* and *Couchant*, no other Beasts ought to be put upon the Common, but those of the Tenant of the Land to which it is Appendant, or those that he takes to compester the same.

mon: For no other Beasts ought to be put into the Common, but those of the Tenant of the Land to which it is Appendant, or those which he takes to compester his Land. *Per Cur'*, This had been ill upon Demurrer. But after a Verdict, the Court shall intend they were Beasts which the Parson procured to compester the Land; and the Right of the Case is tried, and so aided by the Statute of *Oxen. 1 Vent. 18. Rumsey and Rawson's Case.*

*The Manner of Pleading in making Title to Common. In Declaration and Pleading.*

No Title need to be made where an Action is brought upon the Possession. The Plaintiff declared in Trespass, that he was seised of a Messuage and 20 Acres of Land, and ought to have Common of Pasture in *W.* for his Beasts *Levant and Couchant, &c.* unto the said Tenement appertaining, and that the Defendant chased the Plaintiff's Beasts: And in Error it was alledged, That the Plaintiff's Declaration was not sufficient, because no Title is made to Common by Prescription, as the Precedents are. But *per Cur'*, This Action is founded upon the Possession, and brought against a *Tort-fesor*, and so it is not necessary to make Title. So is *Saunders and Williams's Case*, *Sir Thomas Jones 148. Bound and Broking's Case*, *Cro. Car. 325, 575. Cro. Jac. 43. 3 Keb. 820.*

Where the Cause of Action is for Damages only, the Plaintiff need not make Title.

In an Action on the Case, for Disturbance of Common: The Plaintiff declared on Seisin of one Acre in Fee, and of another for Years; and



and that he had Common for all Cattle *Levant* and *Couchant* on both Acres. And Verdict *pro Quer'*. And in *Gateward's Case*, 6 Rep. It was excepted in Arrest of Judgment, That the Plaintiff has made no Title. *Per Cur'*, He need not, the cause of Action being the Damages only, and the Title is collateral: So in Case of stopping a Way, Water-course, Lights, &c.

The Defendant justifies in Trespass Damage-Feasant. The Plaintiff replies, That he is seised of a Messuage, and 20 Acres of Land in D. and prescribes for Common, for all his Beasts *Levant* and *Couchant* every Year, after the Corn is severed and carried away, until it be resown; and that he after the Corn cut and carried away, put in his Beasts, &c. *utendo communia sua prædicta*, The Replication is not good, because he saith, he put in his Cattle after the Corn severed and carried away; and saith not, That it was before the Land resown, for otherwise he had not Title to Common. Yet after a Verdict on Issue on the Prescription it is helped, and it shall be taken by Intendment, when he said he put them in *utendo communia sua prædicta*, That it was at such time as the Common is to be used, and with such Cattle as are there to use the Common; though he did not aver, that the said Cattle were there *Levant* and *Couchant*. *Cro. Eliz.* p. 458. *Corbyson* and *Pearson's Case*.

*Utendo communia sua*, how to be intended.

In an Action of Trespass, the Exceptions taken to the Defendant's Plea were. 1<sup>st</sup>, That the Defendant claims Common in *T. ratione Vicinagii*, and saith not *a Tempore cujus contrarium*,



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*trarium, &c.* By *Rolle*, There needs no Prescription in this Case, no more than in Common Appendant; (which Case of Common Appendant was agreed *per totam Cur'*.) 2. The Defendant alledgeth, That he and all the Occupiers of *D. Close*, have used to have Common in the said *T. &c.* Whereas he ought to have shewed what Estate they had in *D. Close*, who have used to have this Common. By *Rolle*, If it be by Way of Prescription, it is not good: But if it be by Way of Custom then it is good; for a Custom goes to Land, and a Prescription to Persons, as in *Gateward's Case*. When it is by Way of Discharge, it may be alledged in all Occupiers. But *per Cur'*, It cannot be a Custom here, for a Custom cannot extend to a particular Place. Another Exception was, He claimed Common in *T.* for Cattle *Levant* and *Couchant* in *D. Close*, and doth not aver, that these Beasts were *Levant* and *Couchant*, which he ought to do, *per Cur'*. *Jenkins* and *Vivian's Case*.

Difference  
between Custom and Prescription. *Vide*  
*Cre. Car. 200.*

The Nature  
of Custom.

*Levant* and  
*Couchant*.

Prescription  
for Common  
generally.

In Trespass, The Defendant prescribes for Common generally: This is a good Plea, without shewing that the Common was Appendant or otherwise; but in Assize, or other Action, where Title is made, *aliter*. 35 H. 6. 5, 6.

Prior not intitled by Prescription or Grant.

The Defendant justifies in Trespass, because the Prior of *D.* was seised in Fee of such a great Close in *D.* and was seised in Fee of the Pasturage in the place aforesaid, for all his Sheep *Levant, &c.* It was assigned for Error, because the Defendant intitles the Prior, neither by Prescription nor Grant, this being a Profit Apprender *in alieno solo*. But *per Cur'*,  
The

The Plea is good, for this Pasturage claimed for Sheep *Levant* and *Couchant* on the Defendants Land is Common Appendant, and cannot be severed from the Soil by Grant, and then to make Prescription thereto is not good. And the Statute of 31 H. 8. would have aided it, if it had not been good at Common Law, that the Prior was seised in Fee thereof, *tempore dissolutionis*, Cro. Car. 542. *Daniel* against the Earl of Hertford.

Common Appendant not to be prescribed for.

In Pleading a Custom, That the customary Tenants of a Manor have had *solam & sepe- ralem Pasturam* in the Soil of the Lord, they need not shew what Estate they had in their customary Tenements. 2 Saund. 326, 327.

If a Man has Common in Waste for 100 Sheep, appertaining to a Messuage and Land, and he purchaseth another Messuage with Land, and had Common also in the said Waste, for another 100 Sheep by Prescription; he ought to make two several Titles and Prescriptions for the 200 Sheep, and not to join them together. Dyer 164. Pl. 59.

Where several Titles and Prescriptions shall be made.

A Man hath an Acre of Freehold in a great Field, to which Common doth belong; now he cannot in his Prescription lay it, that he hath Common in the whole Field, but in such a part of the Field, as in that part towards the East, &c. because if otherwise, then he should extend his Prescription to his own Land, which would not be good; and because the Plaintiff had laid his Prescription to the whole Field, he was nonsuited, *Conyers* and *Jackson's Case*, by Baron Davenport at York Assizes.

Prescription in a Field, how to be laid.

Special

*Special Prescription, and the Form of Pleading.*

If a Commoner purchase a Parcel of the Land in which, Common Appendant shall be apportioned, and in such a case the Prescription ought to be special, (*viz.*) to prescribe to have Common in all till such a Day; and then to shew the Purchase of Part, and that from that time he had put in his Beasts in the Residue, *pro rata portione.* 4 Rep. 38. *Tirringham's Case.*

Prescription  
for Common,  
*antiquo Messu-  
agio.*

A Common may be prescribed for to an ancient Messuage. As in Trespass, The Defendant pleads that *J. R. diu ante le Trespass,* was seised of an ancient Messuage *cum pertin'*, and prescribes for Common of Pasture in the Close of the Plaintiff, for his Beasts *Levant* and *Couchant* on the said Messuage *cum pertin'*. This is a good Prescription, for it is not Common Appendant but Appurtenant, and such Common is usual in *Lincolnshire*, and other Places: Though it was objected, That Beasts cannot be *Levant* and *Couchant* upon a Messuage. *Sir Thomas Jones's Rep. 227. Scambler and Johnson's Case.*

Prescription  
at certain  
Times, how  
to be laid.

The Prescription was for all Cattle Commonable in this manner, (*viz.*) If the Land be sowed by Assent of the Commoners, then no Common until the Corn is mowed; and then Common until the Land be sowed again by Assent of the Commoners; this Prescription is good, for by the Law the Owner cannot plow the Land where another has Common. But here is a Benefit for each Party; as well for the Owner of the Land  
against

against the Commoner, as for the Commoner against the Tenant of the Land, for each has a qualified Interest in the Land. 1 Leon. c. 100. p. 73. *Hawkes and Molineux's Case*.

Now observe the consequence of such Special Prescription, and how carefully it ought to be laid. As in *Greatrick's Case*: In an Action on the Case, The Plaintiff prescribed for Common every two Years, when the Land is sowed with Corn, after the reaping of such Corn, and for the third Year for all the Year; and avers, that the Time in which, was the second Year. *Per Cur'*, The Plaintiff shall only have Common from the Time of the second Year, after which the Corn should be reaped; and unless the Land be sown he cannot have Common. So that if it be not sowed the third Year, he cannot have Common as this Prescription is laid. The like is in *Mellor and Clark's Case*. 2 Keb. 350, 355, 363, 397. *Greatrick's Case*.

An Action on the Case was brought for Enclosing Common two Years, and the Prescription was to have Common every two Years when the Ground is sowed, when the Corn is reaped, *quousque refeminaretur*, and every third Year *per totum annum*. *Per Cur'*, The Party upon this Prescription has Common, whenever the Land is unsowed, or the Corn carried away: And it's impossible, but the Plaintiff must be entitled to one Year, the Land having been three fallow. But no Action on the Case lies for not plowing. 2 Keb. 838, 876, 858. *Miller and Clark's Case*.

Common Appendant may be to a Commoner after the Corn severed, until it be resowed. *Fitz. N. B.* 180. So



## The Law of Commons.

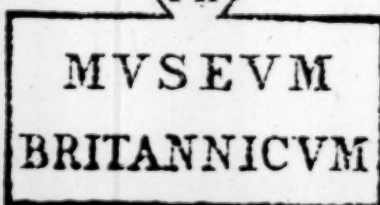
So it may be to a Commoner in a Meadow, after the Grass carried off till *Candlemas*. 17 *Ed.* 3. 26, 34.

So it may to be a Commoner in Pasture, from the Feast of St. *Augustine* till *All-Saints*. So it may be to a Commoner two Years after the Corn cut and carried away, until the Land be sowed again, and every third Year for all the Year. 22 *Aff.* 42.

There is a Special manner of Common in *Norfolk* called *Shack*, to be taken in Arable Land, after Harvest till Sowing Time; and the Field consists of the Lands of divers Persons, in small Parcels intermix'd; so that one cannot feed in his own Land without Trespassing upon the other, and therefore every one puts in their Beasts promiscuously to go *Shack*; (that is) at large. This *Shack* at first, was but in the Nature of Common by Cause of *Vicinage*. In many places in this County, it is altered to Common Appendant, or Appurtenant: Yet. if one had an ancient Close in Severalty, and he, and all those, &c. had held this always in Several, he may keep it inclosed; for as to this Parcel, *Shack* retains its Original Nature, and he which claims *Shack*, shall not prescribe to have Common in it. 7 *Rep.* Sir *Miles Corbet's* Case. See *Bro. Common* 35.

And if in any Town one has divers Parcels of Land lying together, in which the Inhabitants (of another Town) have used to have *Shack*, and Passage into it by Bars and Gates, with their Beasts and Cattle there, this is taken as Common Appendant or Appurtenant. But if in the Town of *D.* the Usage hath been, That

FH



That every Owner hath been used to inclose his own Lands from Time to Time, and so to hold it in Severalty; this Usage proves, That it was originally but in Nature of *Shack*, and was by Reason of *Vicinage*. And therefore he may inclose and hold it in Severalty if he will.  
7 Co. 5.

Also, If the Commons of the Towns of *A.* and *B.* are contiguous, and one ought to have Common with the other by Reason of *Vicinage*, and within the Common of *A.* are 50 Acres, and of *B.* 100 Acres, there the Inhabitants of *A.* cannot put in more Beasts than their 50 Acres will depasture, without regarding the Common of *B.* nor *e converso*; for the Original Cause of this Common was because of *Vicinage*, and the adjoining of the Commons together was not for the particular Profit or Advantage to either Town in taking their Common more than the other, but was rather to prevent Suits, that in open Countries would otherwise arise by reciprocal Escapes of Cattle from the one Town into the other. *Vide* 7 Co. 5. b. 4 Co. 38. Co. Lit. 122. *Vide ante* 32.

*Repl<sup>r</sup>* and *Avowry*, For taking six Kine in *Brisley-Hill* in *Radley*. That the place where contains 50 Acres in the Manor of *Barton*, and shew that *Edw. 6.* was seised of the Manor of *Barton*, and grants it to *Lee*; and amongst other Particulars in the Patent the King grants *Brisley-Hill* in *Barton*, and so brings down the Freehold. The Plaintiff replies, *H.* is seised of a Messuage, and divers Acres of Land in *Radley*; and he, and all those whose Estates, &c. have had, for themselves and Farmers, and Tenants in the said place called *Brisley-Hill*

*Hill in Radley*, when the Field called *Brisley-Hill in Radley* lay fresh, and not sowed thro' all the Year, with their Beasts *Levant*, &c. and when the said Field is sowed with Corn, then when the Corn is carried away, till it be sowed again: And so justifies, because the said Field was not sowed with Corn. The Defendant rejoined, That Parcel of the Field called *Brisley-Hill*, in the Avowry named, was sowed with Corn *tempore*, &c. and the Plaintiff demurred. Adjudged *per Cur'* for the Plaintiff.

*Locus in quo*,  
how to be  
pleaded.

Catching Plea.

1. Because the Defendant in his Rejoinder refers his Plea to another Place, than where the taking is supposed, and that is not in Question; The Plaintiff claims Common in *Brisley-Hill in Radley*, and the Field named in the Avowry, and to which he refers his Plea, is *Brisley Hill in Barton*, for *Brisley-Hill in Radley* is not named in the Avowry by special Name, but only by Implication, (*videlicet*) *Locus in quo*. 2. Because the Defendant gives not any full Answer to the Matter, he saith Parcel was sowed with Corn; and the sowing a little Parcel of Corn in the Field, shall not oust the Commoner of the Residue: And when he said *campus, id est, totus campus*. *Yelv. p. 185. Trullock and Rigsby's Case.*

He who is  
confined with-  
in a certain  
Time, how to  
prescribe.

He who is confined within what Time to have his Common, ought to shew he is within the Time; otherwise, it does not enable him to use the Common. And therefore in *Jackson and Bell's Case*. In *Replevin* the Defendant avows for Damage-Feasant in his Freehold: The Plaintiff shews, That the place where, is Parcel of a great Field called *W. in T.* and prescribes to have Common to a Mes-  
suage

suage and two Acres in the said Field *ubicunque, & postquam blada & herbae ibidem crescentia* be reaped and carried away, *quousque* the said Field, or any Part thereof, be resown. And that *ante tempus quo, & postquam* the Corn in the said Field was reaped, and carried away from the said Places, &c. he put in his Cattle *Levant* and *Couchant* upon his Tenements, to use, &c. his Common there; and upon Demurrer adjudged against him. 1. Because he saith *ante tempus, &c.* and doth not say in which Year the Field was sown, and the Corn carried away. 2. It is not shewed, That the said Field, or any Part thereof, was not resown, and then it is not within his Prescription. *Cro. Jac. 63. Jackson and Bell's Case.*

The Prescription more at large contains the The Prescription more at large contains the less, as for 12 Cows is good for five; and for half a Year is sufficient, if it be found for more. The principal Case was upon a Motion to alter a Prescription for Common laid only when Ground is untilld, and that he may lay it generally, which the Court granted. 3 *Keb. 346. Willington and Adderley's Case.*

Prescription to have Common for a Cow and an half, may be good: As every Yardland within such a Vill, to have Common in such a Place for 12 Cows, and for a quarter of a Yard 3 Cows, and for half a quarter one Cow and an half.

In Case of Tenants in Common, there must be a special Prescription; because Prescription ought to be Time out of Memory, and such general Prescription once failing, shall not be made good. But general Prescription is good in case of Coparceners, Special Prescription in case of Tenants in Common, and General Prescription in case of Coparceners,



## The Law of Commons:

in the Case of Coparceners, because they are all but one Heir; and though the Demesnes are allotted to one, and the Manor to another, if one die, the other hath a good Manor. 2 Roll. Rep. 310. E. of Devon and Eyre.

### In Declarations on Prescription.

*Where Title need to be made, or not.*

The Plaintiff declares, He was seised of a Messuage and 20 Acres of Land, and ought to have Common of Pasture in *W.* for his Sheep *Levant* and *Couchant*, &c. unto the said Tenements appertaining; and that the Defendant chased the Plaintiff's Beasts, &c. It was alleged in Error, That the Declaration was not sufficient, because no Title is made to the Common by Prescription, as the Precedents are. But *per Cur'*, This Action is founded on the Possession, and brought against a *Tortfeasor*, and so not necessary to make Title. So in an Action on the Case, for Disturbance of Common; the Plaintiff declared of Seisin of one Acre in Fee, and another for Years, and that he had Common for all Cattle *Levant* and *Couchant* on both Acres; and Verdict *pro Quer'*. And in *Gateward's Case*, 6 Rep. it was excepted in Arrest of Judgment, That the Plaintiff has made no Title: *Per Cur'*, He need not; the Cause of the Action being the Damages only, and the Title is collateral. So in Case of stopping a Way, Lights, Water-course, &c. Cro. Car. 325, 499, 575. *Symond's Case*. Cro. Jac. 43. 3 Keb. 820. *Sanders and Williams's Case*

The

The Plaintiff in an Action on the Case entitles himself by Prescription to a Fold-course for Sheep, upon all the Lands in such a Field on *Michaelmas-day*, and so to *Lady-day*, the Land being unsown; and for that the Defendant put on Sheep, &c. before *Michaelmas-day*, and after, &c. and thereby fed the Grounds, &c. the Plaintiff could not take so good Feed, *per quod Actio*, &c. By *Hale, Norf. Summer-Assizes 1668*. The Owner may put on Sheep, and feed his own Grounds before *Michaelmas*, unless a Custom be to the Contrary, which ought to be laid in the Declaration; *contra* of a Stranger. *Braithwait and Hunt's Case*.

The Declaration must be maintained by the Prescription. One prescribes to have Common Appurtenant in the Place where, &c. *pro omnibus equis vaccis & porcis suis*. Now the Declaration in *Replevin* was, *De captione unius equi unius spadonis, &c. Per Cur'*, The Word *equus* is a general Word, and comprehends as well Stone-horses as Geldings, so it's well maintained: Otherwise, had it been for Mares. *Vide infra. Tit. Failer of Prescription, Cro. Eliz, 798. Stapleton and Morris's Case*.

Declaration must be maintained by the Prescription.

But of the manner of laying Prescriptions, *Vide supra Tit. Prescriptions*.

A Common must be laid to be Appendant, or Appurtenant, or in Gross, because it is an Interest. *Vide supra, sub Tit. Maxims*.

In *Replevin*, the Defendant avows for Damage-feasant in his Freehold, the Plaintiff pleads for *Solam pasturam* in Bar, a Custom for the Copyholders of the Manor to have *Solam pasturam omni Anno, omni tempore Anni*, and that he by License of

*sturam* not saying *Levant, &c.*

a Copyholder put in his Beasts, &c. The Issue was *nul tiel* Custom; and Verdict for the Plaintiff, and thereupon 'twas mov'd in Arrest of Judgment. 1. That the Custom to have *Solam pasturam* (excluding the Lord) was not good. 2. That 'twas not averred, That the Beasts were *Levant* and *Couchant* on the Copyhold. 3. That Commoners ought to take their Common by the Mouths of their own Beasts, and not those of Strangers. 4. If he can license another to take it, yet he cannot do it without Deed. But 'twas answered, 1. That the Custom is good, for it is not Common but Pasture, and the Lord is not excluded of the whole Profit, but of the Pasture only, for he has the Mines, Coals, Trees, Stones, &c. 2. Here needs no *Levancy* and *Couchancy*, for the Copyholders are to have all the Pasture, and 'tis not restrained to Common for Beasts *Levant*, &c. on the Tenements; and as to the 4th, a License *pro bat vice tantum*, may be by Parol, but if for any Time certain, it cannot be without Deed; because it then becomes a Lease, being of a Thing that lies in Grant, which cannot be without Deed. And further, That this not being Common but Pasture, may be taken by the Beasts of a Stranger; though had it been Common, perhaps not. To all which the Court seemed inclined, and accordingly gave Judgment for the Plaintiff. *Hopkins ver. Robinson.* 2 Lev. 2. *Vide Monk and Butler's Case,* 2 Cro. 1 Vent. 123. 163. 1 Mod. 74.

2 Cro.

License to  
take Common  
Sans Deed,  
when good  
or not.

Common not  
to be with a  
Stranger's  
Cattle.

In

In Error of a Judgment in *Replevin* in *Dur-*  
*ham*, where the Defendant avowed, That *Sunderland* is an ancient Borough, consisting of  
 12 Capital Burgeses called Freemen, and of 12 inferior Burgeses called Stallingers, and that  
 there is a Custom, That every Freeman inhabiting any Messuage there, hath Common in  
 the Place where, &c. for 2 Horses, and 4 Cows, and each Stallinger inhabiting, &c. for  
 one Cow, and for that the Plaintiff being a Stranger put his Cattle there to the Prejudice  
 of his Common, the Defendant avowed the Taking, The Plaintiff traversed the Custom,  
 and the Jury found, That the Capital Burgeses, viz. the Freemen, had Common for 2 Horses,  
 or 4 Cows, and the Stallingers Common for one Cow: But further found, That the Wife  
 of every Freeman or Stallinger inhabiting had the same Common after the Death of their  
 Husbands, and that the Copyholders, Capital Burgeses, and Stallingers have Common also  
 for Cows, Calves, Oxen, Heifers, &c. *Et omnibus ad quantitatem & loco & vice* (Anglice their Stints) *ut present' limitat'*, and on this Verdict  
 Judgment was for the Avowant, and thereupon 2 Errors assigned. 1. That the Common  
 found is another and different from what is pleaded, *Scilicet* for Oxen, Calves, Heifers,  
 &c. 2. The Custom found for the Inhabitants to have Common is ill, and all one with *Gate-*  
*ward's Case*. 6 *Coke*. But answered and resolved. 1. The Jury having found the Custom  
 expressly at first, all that they have found further is void, as 3 *Cro.* 435. and 546. 2. The  
 Custom here is not for Inhabitants, but for Freemen and Stallingers who are Members of  
 the



the Corporation inhabiting there, and the Habitation is only restrictive, *viz.* That they shall not have Common except they inhabit.  
 3. The Custom laid for each Member to have it is good, as well as where it is laid in the Corporation to have it for themselves, and every Member thereof. *Hinks ver. Clerk, 2 Lev. 252, 253.*

A Burgeſs  
 preſcribes for  
 Common in  
 the Mayor  
 and Burgeſſes,  
 as in Groſs.

As in the Case of *Staples ver. Meller, 2 Lev. 246.* In Action on the Case for Disturbance of his Common, and prescribed, That the Mayor and Burgeſſes of *Derby*, Time out of Mind, have had Common for themselves, & *quolibet eorum*, and brings the Action as Burgeſs; The Prescription was traversed, and Verdict for the Plaintiff, and 'twas mov'd in Arrest of Judgment, That the Prescription was not good. 1. Because 'tis not laid to be (Appendant or ) Appurtenant to any Land. 2. That the Prescription ought not to be in the Name of the Mayor, but in every Burgeſs, *viz. Quod quilibet Burgenſium. &c.* For in a Corporation it ought to be laid by Custom. As *Rolle, Common 403. 15 E. 4. 29. ſed Curia contra.* That this may well be Common in Groſs, and not Appurtenant to any Land. 9 *H. 6. 36. 1 Co. 87.* As where one grants Common to the Mayor and Burgeſſes for all their Cattle, in ſuch a Place; this is good and in Groſs, and is not Appurtenant.

C H A P. XV.

*The Nature of Prescription. The Difference between it and Custom, as to Pleading. What Common is to be prescribed for, and what not. What Prescription to Common shall be made, and how to be made in Reference to Persons prescribing. Who to prescribe, and in whose Name Prescription for Common to be made. Of Prescription by a Que Estate. Of Prescription by Copyholders. Where it must be Special Prescription by a Corporation, how to be made. Prescription by Inhabitants. The Form and Manner of pleading Prescription for Commons, laid down in several general Rules and Maxims. Where, and how the Owner of the Soil shall be excluded, or how and wherein stinted. Prescription for sola & separalis Pastura, how made. The like for a Drift of Common.*

**B**ECAUSE Pleading as to Commons is generally laid by way of Prescription, and sometimes by way of Custom; it will be necessary that I should say something of the Nature of Prescription, and the different ways of Pleading it, and Custom. And without doubt this is a very material part of Learning in our Law, and curious enough; for want of the Knowledge whereof, many a Judgment hath been reversed, many Pleadings overthrown, and many Trials (which otherwise might have succeeded well,) have been spoiled by Failure of Prescription upon the Evidence.

## The Law of Commons.

*First*, Briefly of the Nature of Prescription in General; and then I shall treat of it more at large, as it falls under the particular Considerations in Reference to Commons; especially such as we call Appurtenant.

The Nature  
of Prescripti-  
on in Gene-  
ral.

Prescription then *est Titulus ex usu & tempore substantiam capiens ab autoritate Legis*. It is a Title created to a Person and his Heirs, unto some Profit, &c. out of another's Estate; and this Title which Prescription makes, is created, founded and established by Usage and Time; and one without the other will not do.

It is said by Sir *Francis North*, in his Argument in *Potter and North's Case*: That a Prescription that is to claim a real Interest of Profit *in solo alieno* is a Title, and as a Title must be strictly and curiously pleaded, and is not like Prescriptions, that are by way of Discharge, and for Easement, or for matters of personal Exemption. 1 *Vent.* 386.

Prescription  
how to be  
pleaded.

Custom, how  
to be pleaded.

Now a Prescription is personal, and is for the most part applied to Persons, being made in the Name of a certain Person and his Ancestors, or those whose Estate he hath; or else in Bodies Politick and Corporate, and their Predecessors. But a Custom which is *local* is alledged in no Person, but laid within a Manor, or some other Place, Take one Example of each: *J. S.* seised of the Manor of *D.* in Fee, prescribes in this manner, That *J. S.* and his Ancestors, and all those whose Estate he hath in the said Manor, have Time out of Mind of Man had, and used to have Common of Pasture, in such a Place, &c. (being the Land of some other, &c.) as pertaining

ing to the said Manor. This properly is called a Prescription: A Custom is in this manner, A Copyholder of the Manor of D. doth plead, That within the same Manor, there is, and has been such a Custom Time out of Mind of Man used; that all the Copyholders of the said Manor have had, and used to have Common of Pasture, &c. in such a Waste of the Lord, Parcel of the said Manor, &c. where the Person neither doth, or can prescribe, but alledgeth the Custom within the Manor; which Difference will be further illustrated, and the Reasons of the same laid down, when we come to apply it to the several Forms and Rules of Pleading.

I shall now come to treat of Prescription in Reference to Common, and shew

1<sup>st</sup>, What Common is to be prescribed for, and what not.

2<sup>ly</sup>, What Prescription to Common shall be made, and how to be pleaded. And this,

1. In Reference to the Persons prescribing.

2. In Respect of the things prescribed for.

3. The Manner and Form of Pleading Prescription, and this by several Rules, and several Actions; both to Prescriptions general and special.

For



*For what Common a Man must prescribe, and  
for what he need not.*

**Common Appendant to be prescribed for.** For Common Appendant a Man must not prescribe. This Common must not be prescribed for; and yet it must be laid to be Time out of Memory. I find in our Books, that the Reporters are somewhat puzzled about Pleading of this sort of Common: Some say it may be prescribed for, 4 Rep. 37. *Tirringham's Case*: Some say it need not be prescribed for; and some say it must not be prescribed for; and if it be, it's void, and shall make the Plea vicious. 4 Rep. *Tirringham's Case*. 1 Roll. Abr. 401. Gro. Car. 542. in *Daniel's Case*.

*Nichols*, Justice, in *Johnson and Thoroughgood's* said, That for Common Appendant, it's not necessary to prescribe, but to say he is seised of one Messuage in Fee, and that he has Common of Pasture in the said place as belonging and appertaining to his Tenement. And in 1 Roll. Abr. 399. a Man need not prescribe for Common *causa Vicinagii*; but it sufficeth to say that he and all those whose Estate he has, &c. have used to intercommon *causa Vicinagii*; because it's Common Appendant. And it's said in 2 Roll. Rep. in the Earl of *Devon* and *Eyre's Case*, That Common Appendant and Common Appurtenant do not much differ in Pleading as to the Form of Prescription it self, but the manner of laying it; as for the Purpose, if a Man claim Common for all his Beasts; this appears not to be Common Appendant; because the Generality of the Claim

Claim includes Beasts agistant, and Common Appendant is for Beasts agisting upon the Land. So in *Tirringham's Case*, it was not adjudged upon the Prescription; for it is granted there, that Common Appendant may be prescribed for; but upon the Manner: He prescribed for Common Appendant to a Messuage, which was against the Nature of Common Appendant, and therefore in that Case it was Common Appurtenant, and so extinct by Purchase of the Whole. Now the Reason of those who hold that Common Appendant cannot be prescribed for, is, because Common Appendant cannot be severed from the Soil by Grant, and therefore to make Prescription for it, it's not good: And indeed in the very Notion of Prescription, it's supposed that it was not belonging *ab origine*; but it had a lawful Commencement by Grant. But enough of this Nicety, Prescriptions being most usually made for Common Appurtenant.

Prescription ought to be for Common Appurtenant.

Common *par cause de Vicinage* need not be prescribed for; because it's Common Appendant in its Nature.

If a Prescription may be for Common in *Gross Sans Number*, is doubted in 1 *Saund.* 345. *Meller and Spateman's Case. Vide infra.*

One may not prescribe for Common to a Cottage, and yet by *Wyndham in Chedle and Meller's Case*, in the *West Country*, Men claim to a Cottage Common without Number: So in *Lincolnshire*; and the Reason of the Prescription was to bring the Inhabitants to the unwhole-

Prescription must be for Common Appurtenant. Common *par cause de Vicinage* need not be prescribed for.

Common to a Cottage.

## The Law of Commons.

unwholesome Air, which is a sufficient Reason when alledged, for the Prescription. 2 Keb. 108. 312.

A Man may prescribe for Common or other Profit, or Easement, for himself and his Tenants.

In Case of Tenant in Common, the Prescription must be special; in case of Coparcenary, general. *Vide supra*, Earl of Devon and Eyre's Case.

2. In respect of the Things prescribed for,

To Common Appendant. *Vide hic supra*.

To Common Appurtenant. *Vide supra*.

Tenant in Fee.

Tenant in Fee-simple ought to prescribe in his own Name.

Tenant for Life, Years, &c.

Tenant for Life, Years, *Elegit*, or at Will, must prescribe in the Name of him who had the Fee, but he which has not any Interest cannot have any Common. *Vide infra*, 6 Rep. 60. *Gateward's Case*, *Dyer* 71. *Jones* 276.

Corporation.

A Man may prescribe for Common or other Profit or Easement for himself and his Tenants; and so a Corporation for themselves and their particular Tenants: But Inhabitants not incorporate, cannot prescribe for Common. *Vide infra*, 1 *Saund.* 344.

Prescription by a *Que estate*.

No Man can prescribe for a Rent or other Charge in another Man's Soil, for no Estate can be of things in Grant; a Man prescribed he was seised, and used to dig Clay in another Man's Soil, to make Pots; It was adjudged void; because whatever Interest is claimed in another's Soil, must be annexed in Property to his own. But by *Twisden* and *Wyndham*,

*Wyndham*, albeit no *Que estate* can be alledged of things in Grant, yet a Man may have such Charges by Descent from his Ancestors, alledging that he and his Ancestors Time out of Mind have had, &c. And so is the Case of *Littleton* to be understood. One may not prescribe in any thing by a *Que estate* which lies in Grant and may not pass without Deed or Fine; but in him and his Ancestors he may; because he comes in by Descent, without any Conveyance. 2 *Keb.* 290 312. 1 *Inst.* 12. 1. a.

When the Copyholder claims any thing by Prescription in the Soil of another, in Pleading he ought to prescribe in the Name of the Lord; but if he claim any thing in the Soil of the Lord within the Manor, then he shall plead the Custom of the Manor; for there he cannot plead in the Name of the Lord, inasmuch as the Lord cannot prescribe in his own Soil. And so saith *Hobart*. There is nothing more common, than for the Lord to prescribe for his Tenants by Copy in another Man's Soil; whereas, if it be in his own, it shall ever be laid by Custom. 1 *Rep. Foyston's Case*, and 31, *Cowper's Case*, 6 *Rep.* 60. *Gateward's Case*, *Hob.* 28. 61. Now to apply this by several Cases.

How the Copyholder is to prescribe.

In *Replevin*, the Defendant makes Conuſance as Bailiff to, &c. Damage-Feasant: In Bar of this the Plaintiff pleads, That *H.* Earl of *H.* was ſeiſed of the Manor of *A.* whereof one Meſſuage, &c. is Parcel, and demisable by Copy, and that within the ſaid Manor there is this Custom, That every customary Tenant of the ſaid Meſſuage, &c. have uſed to have Paſture, &c. in the ſaid place



The place where the taking was supposed, must appear to be within the Manor.

place called *Land-mead*, and so derives his Title by Grant by Copy. The Issue was upon the Traverse, *absque hoc quod infra manerium præd<sup>o</sup> talis habetur consuetudo q<sup>d</sup> quilibet tenens custumarius, &c.* have used to have Common, &c. *prout, &c.* Per Cur<sup>o</sup>, Here is no Custom alledged, because it did not appear in Pleading, that the Place where the taking was supposed to be, was within the Manor, and no Custom of the Manor can extend out of the Manor, but he ought to prescribe in the Manor. Note, He ought to have pleaded, That the Place in which, &c. was Parcel of the Manor, and then the Plea had been good. *Hob. p. 286. 1 Brownl. 172. Roberts and Young's Case.*

And the Necessity of good Pleading a Prescription appears in *James and Read's Case*. Which was, The King was seised of a Manor, where were divers Copyholders for Life; and was also seised of 8 Acres of Land in another Manor, in which the Copyholders have used Time out of Mind to have Common. And afterwards the King grants the Manor to one, and the 8 Acres to another, and a Copyholder puts in his Beasts into the 8 Acres. And in Trespass brought against him by the Parrentee of the 8 Acres he prescribes, That the Lord of the Manor, and all those whose Estate he hath in the Manor, have used Time out of Mind, &c. for themselves, and their Copyholders, to have Common in the said 8 Acres of Land; and he farther pleads, that he was a Copyholder for Life by Grant, (after the said Unity of Possession in the King,) and so demanded Judgment *si actio, &c.* against

which the Unity of Possession was pleaded. And upon Demurrer, *per Cur'*, As this Prescription is pleaded, the Common was extinct; but by special Pleading, he might have been helped and saved his Common, for this was Common Appendant; and so not extinct.

2 Brownl. 47. *James and Read's Case*, 4 Rep. 38. *Tirringham's Case*.

The Custom was alledged, that all the customary Tenants *habuerunt & habere consueverunt separalem pasturam, &c.* It was ex-

cepted to this Plea, That the Copyholders have not shewed what Estate they have in their customary Tenements. But *per Cur'*, It's not material, for be their Estates what they will, in Fee, for Life or Years, Custom has annexed this sole Feeding, as a Profit App- ry Tenements.

prender to their Estates; and this they claim by the Custom of the Manor, and not by Prescription; and here they need not say for Beasts *Levant* and *Couchant*, because they claim all the Herbage, and exclude the Lord totally, and so no Mischief to the Lord.

2 Saund. 326, 327. *Hoskins and Robins's Case*.

The Plaintiff in *Replevin* rejoyns by Custom of all the Copyholders of *B. Acre*, in the Manor of *D.* who used to have Common in *A.* To which the Avowant demurred, because he should have prescribed in the Lord's Name, *A.* being out of the Manor: But the Truth being that *A.* was anciently Parcel, and lately severed by the Lord, this destroys not the Common. But the Copyholder ought to have prescribed specially; that *salis consuetudo* was till such a Day, and that after the Lord granted over, &c. as on Change of a Cor-

Where the Copyholders need not shew what Estates they have in their customary Tenements.

Where it need not be said for Beasts *Levant* and *Couchant*.

In what Cases Copyholders must make special Prescription.

## The Law of Commons.

Corporation in *Lutterell's Case*, so is *Swain's Case*. If a Copyholder for Life had used to have Common in the Waste of the Lord, or certain *Estovers* in his Wood, and the Lord alien the Waste or Wood to a Stranger, and afterwards grants certain Copyhold Lands and Houses for Lives; such Grantees shall have Common and *Estovers* in the Lands and Woods, which were aliened, notwithstanding the Severance. But after such Severance, the Copyholder shall not plead generally, *Quod infra maner' præd' talis habetur consuetudo*; for after such Severance, the Waste or Wood is not Parcel of the Manor; but he may plead, That before, and until such Time of the Severance, *talis habebatur & a toto tempore consuetudo, &c.* and then shew the Severance, as in *Murrell's Case*, where the Lord severs the Freehold and Inheritance from the Copyhold. 1 *Keb.* 652. *Davis* and *Watts's Case*, 8 *Rep.* *Swain's Case*.

### *Prescription by Corporation; by Inhabitants.*

The Form of Prescription by a Corporation. *Vide Saund.* 342, 343, 344. *Miller* and *Spateman's Case*, and the Case of the Corporation of *Derby*.

And it was agreed, That a Corporation may prescribe for the Benefit of their particular Members, as well as a Natural Body for himself and his Tenants. But whether they might prescribe for Common without Number was the Question. But it was agreed, That they cannot prescribe for Common in Gross without Number. If a Corporation may take

a Grant for the Benefit of their particular Members, they may prescribe to have the same Thing for the same Purpose and Intent: For it's a Rule, whatsoever may commence by Grant may be claimed by Prescription. But how they shall prescribe, *Vide supra tit. Levant and Couchant*: But a Corporation may prescribe for a Common in Gross, for Beasts *Levant and Couchant* within the Vill. Though it's said in *Keb. 2. 25. per Kelynge, Twisden and Moreton*, That they conceived a Corporation, as such, cannot have any Common for them and their Tenants, belonging to Ancient Houses in the Corporation. *1 Saund. 345, 346.*

*15 E. 4. 29, 32.* The Mayor, &c. of *Coventry* were directed to prescribe thus, By the Mayor and Citizens for the Inhabitants; which placeth the Interest in the Corporation, tho' the Inhabitants have Interest thereby. See the Prescription by a Borough for *Turbary*, for themselves and Inhabitants. *3 Keb. 247. White and Coleman in B. C.*

One cannot prescribe for Common *ratione commorantiae* or *residentiae*; for an Inhabitant cannot have Common, if he have not any Interest or Estate therein. Such a Prescription cannot begin at this Day, and therefore Usage or Continuance cannot make it good. For a Grant of Common *Inhabitantibus* cannot be good, unless they be a Corporation; and by Prescription it cannot be good. And to say there is such a Vill, and that in the said Vill *habetur talis Consuetudo & a tempore quo habebatur, &c. qd' quilibet Inhabitans in aliquo antiquo mesuagio, &c.* should have

*Remk.*

No Prescription *ratione commorantiae*.

Prescription, the Nature of it.

M

Com-



*Regula*, Inhabitants, except they be incorporated, cannot prescribe for Profit in alieno solo, for Easement they may.

Common in the said Waste, for his Beasts *Levant* and *Couchant* within the said Vill, is not good. And it's a Rule, Inhabitants unless they be Incorporated, cannot prescribe to have Profit in the Soil of another, but only in matters of Easement or Discharge. As in a Way, or to be discharged of Toll, or *in modo decimandi*. Interest ought to be by Persons inabled, who are to have Continuance, according to the Maxim. *Vide supra*, Cro. Eliz. 362. Fowler and Dale's Case, 6 Rep. Gateward's Case, 1 Leon. 58. Costard and Wingfeild's Case, 1 Anderson 151. Cro. Jac. 152. 2 Bulstr. 87, 88. Dyer 71. pl. 24. 2 Leon. 44.

Custom for Inhabitants.

In *Replevin*, The Plaintiff counts of the taking of his Beasts at N. in a place called the *Cow-pasture*. The Defendant makes Conusance, Damage Feasant. The Plaintiff replies, The Vill of N. is an Ancient Vill within which such a Custom is Time out of Memory, that every Householder inhabiting in the said Vill, except the Parson and Vicar, the Inhabitants of the Capital Messuage, and the Inhabitants in the Park, Time out of Memory have used and accustomed to have Common of Pasture for their Beasts in the same Place, *Levant* and *Couchant* yearly, at all times of the Year; and shews, That he was a Householder and Inhabitant in the said Vill, and none of the Persons excepted, &c. by which he put in his Beasts, being *Levant* and *Couchant*, to use his Common *prout ei bene licuit*. The Defendant saith, That the said Messuage of the Plaintiff's was newly erected, and edified within 30 Years last past, and that no other Messuage was erected in any Place, Parcel of this, &c. before

Construction of a Custom, not extend to an House newly built, and the Pleadings.

before the said 30 Years, & *hoc paratus*, &c. And the Plaintiff demurs, and Judgment *pro Quer'*. For this Custom mentioned in the Replication, may not extend to a Messuage newly erected within the Common, nor within the Vill, where no Messuage was ever erected before. *Savile's Rep. p. 81. Wakefeild and Costard's Case.*

A Man cannot prescribe for Common by a Prescription that is unreasonable. As in Trespass the Defendant justifies for Damage-Feasant. The Plaintiff in his Replication prescribes for Common in the place where, &c. in this manner, until the Field was sown with Corn, and after it was sown & *post blada messa*, until it was sown again. To which the Defendant demurs. Now this is unreasonable to have Common in Land sown. But *per Cur'*, As this Prescription is laid, the Common is not claimed till after the Corn reaped. *1 Ventr. 21. Walter and Chamner's Case.*

What Prescription is unreasonable, or not.

Several Men that have several Estates, and in Relation one to another, cannot join in making a Prescription. As in *Rastal's Entr. 622.* Two Commoners join in a Prescription, yet it is a several Prescription, as much as if they had justified severally. It's true, they may join in the Demand, but they must make their Titles severally. *1 Ventr. 388.*

*As for the Form and Manner of Prescriptions  
for Common.*

*The general Rules are these.*

Congruity in  
Pleading.

1. There must be a general Application, and the Common must be pleaded as *Commensurate* to the Thing, to which it belongs. As in *Tirringham's Case*. Common Appendant must be claimed to Land, and not to an House, Meadow or Pasture, and because the Common there was pleaded, as belonging to the Messuage, Meadow and Land, it was adjudged to be Common Appurtenant, and not Common Appendant. But if a Man hath had Common for Beasts of the Plow, Appendant to his Land, and perhaps of late Time an House is built on part, and some part is implied for Pasture, and some for Meadow, and this for Maintenance of Tillage, which was the Original Cause of Common, in this Case the Common remains Appendant. But in Pleading he ought to prescribe to have this Appendant by Purchase; or if he prescribe to have it Appendant to an House, Meadow or Pasture, then he cannot have Common Appendant to it: for then it appears of his own shewing, that it has been always an House, Meadow and Pasture. One may prescribe to have Common Appendant to his Manor, and this shall be in Construction of Law, *Reddendo singula singulis*, Appendant to such Demesnes, which are Ancient Arable Land, and not to any Land lately improved, and made Arable out of his Wastes. And so there

there must be a Congruity : So Common cannot belong to a Cottage. *Vide supra* 13.

Yet in the Case of *Emerton ver. Selby, Hill. 2 Anna* in E. R. it was held, That one may well prescribe for common Appendant to his Cottage, *viz.* In *Replewin* the Defendant avowed for Damage-Feasant in his Freehold, and the Plaintiff pleaded in Bar, That he was seised of a Cottage, and prescribed to have Common in the Defendant's Land, for all Beasts *Levant* and *Couchant* as Appendant to his Cottage, and this was held good on a Demurrer. For a Cottage contains a Curtilage at least, and there is no difference between a Messuage and a Curtilage as to this; and the *Stat. De extenta Manerii* says a Cottage contains a Curtilage, and we will suppose a Cottage has at least a Court-yard to it. Also a Cottage by the Statute ought to have 4 Acres of Land to it. *Vide 1 Salk. 166. Co. Lit. 5. b.*

But see *Vaghan, 253.* where it seems to be admitted, That where one declares, that he was seised *de uno antiquo Messuagio*, and does not shew that any Land was thereto belonging, he cannot claim Common for Cattel *Levant* and *Couchant* therein. For Cattel cannot be *Levant* in common Intention upon a Messuage only.

2. This Rule is laid down in *Potter and North's Case*, (*viz.*) That the thing prescribed for by a *que Estate* (not in Gross, but Appendant, or Appurtenant) must agree in the Nature and Quality of the Thing to which it is annexed or appurtenant. Corporal things cannot be Appurtenant to Corporal,



because they are distinct. *Estovers ardendi* of Wood cannot be Appurtenant to Land, because they cannot be used for it : And Usage alone makes but a Title in Gross, which will serve when it hath Time out of Mind continued in the same Hereditary Line. 1 *Ventr.* 386.

3. Another Rule to know when a Prescription is good in Pleading is this. For the Law allows Prescription, but it supplies the loss of a Grant. Ancient Grants happen to be lost many Times, and it would be hard, that no Title could be made to things that lie in Grant, but by shewing a Grant. Therefore upon usage *temps d'ont, &c.* the Law presumes a Grant, and a lawful beginning, and allows such Usage for a good Title ; but still, it is but in Supply of the Loss of a Grant. And therefore, for such things as can have no lawful beginning, nor be created at this Day by any Matter of Grant or Reservation, or Deed that can be supposed, no Prescription is good. As Prescription by a Lord, to have so much for every Pound-Breach, is a good Prescription to bind the Tenants, but naught as to a Stranger ; because, as to the Tenant it might have a good beginning by way of Reservation ; but as to a Stranger, it could have no lawful beginning by any Grant or Reservation. 1 *Vent.* 387. in the Argument of *Potter* and *North's Case*.

What may have a good beginning by Grant may be prescribed for. Now it was strongly urged in *Sir George Sparks's Case*, which was to have the Herbage and Pasturage in all the 5 Acres ; that this was all one, as to prescribe for the Land it self (which Prescription is void.)

void,) For if a Man lets the Profits and Herbage of his Land for Years, this is a Lease of the Land it self; which was agreed by the Court as to that. But *per Cur'*, This Prescription is good. For it may have a good beginning by Grant: For a Man may grant the Feeding and Pasturage of his Land when it is not sowed; and by consequence, that may be good by Prescription. *Mod. Rep. 6. Winch. p. 6. Sir George Spark's Case, 1 Saund. 345, 346.*

4. A Man may not prescribe in a Profit Appendant to a Thing, unless this principal thing had, and may have a perpetual Durance and Continuance. *Ergo* not for Common, *ratione commorantie*, or for Resiency. *Dyer 70. 1 And. 151.*

5. The Land to which, and in which Common is claimed, ought to be certainly shewed, as in *Trulock* and *Rigbyes's Case*. Because the Defendant in his Rejoinder refers his Plea to another place, than where the taking is supposed, which is not in Question. As the Plaintiff claimed Common in *Brisly Hill* in *Radley*, and the Field named in the *Avowry*, and to which he refers his Plea, is *Brisley-Hill* in *Barton*. And the *Locus in quo*, &c. which is only by Implication, will not help it. *Vide supra*, This Case more at large. Where a certain Number of the Cattel *Levant* and *Couchant* are to be express'd, or not. *Vide supra, Telv. 885. Brownl. 188.*

In an Action of Trespass, and Justification for Damage-Feasant; The Plaintiff replies, That he is seised of such Lands in *M.* in Fee; and that he, and all those whose Estate, &c.

*Magna averia.* have had Common *pro 25 magnis averiis* every Year after *May-day*, in the place where: The Plea is good, though it is not expressed certainly for what Beasts he claims; for *magna averia* may well be intended Horses, Oxen, Kine, or other such Beasts of those Kinds that are commonable. A Man prescribes for Common Appurtenant to a Manor, or to a Messuage, it's uncertain and not good. *Cro. Jac. 580. Strandfeld and Shoreditch's Case. Benloe no. 82.*

*Where, and in what Cases the Owner of the Land shall be excluded, or stinted in his own Soil.*

Prescription cannot be to exclude the Owner.

If a Man claim by Prescription, any manner of Common in another Man's Land, and that the Owner of the Land be excluded to have Pasture, *Estovers*, &c. This is a Prescription, or Custom against Law, to exclude the Owner of the Soil, for it's against the Nature of this word Common; and it was implied in the first Grant, that the Owner of the Soil should take reasonable Profit there, *Co. 1, Inst. 122. White and Shirland's Case.*

But one may prescribe for *seperalem pasturam. &c.*

But a Man may prescribe, or alledge a Custom to have and enjoy *solam vesturam terræ*, from such a Day till such a Day, and hereby the Owner of the Soil shall be excluded to pasture, or feed there; and so he may prescribe to have *seperalem pasturam*, and exclude the Owner. So a Man may prescribe to have *seperalem piscariam* in such a Water, and the Owner of the Soil shall not fish there. But if a Man claim *communiam Piscaria,*

*ebariae*, or *Liberam Pifbariam*, the Owner of the Soil shall fish there. *Caveat le Pleader*, 1 *Inst.* 22, 23. *Chinery* and *Fisher's Case*, *Foyson* and *Cracbrood's Case*.

In *Kenrick* and *Pargiter's*, The Lord may be stinted in his own Soil. A Custom was surmised, That the Plaintiff in *Replevin* being Lord, and enjoying the place where, &c. only to himself till *Lammas-day*, and after this Day it should be common for the Tenants, and that the Lord should put in but three Horses; and because the Plaintiff after *Lammas-day* put in more than three Horses, he took them Damage-Feasant. And it was found for the Plaintiff, and adjudged on Motion to arrest the Judgment, That the Custom is not good: For the Commoners by the Custom may gain the sole Feeding in the Lord's Soil. This Case therefore is reported in 2 *Roll. Abr.* 267. That it is not a good Prescription. *Yelv.* p. 129. *Kenrick* and *Pargiter's Case*, 2 *Bulstr.* 87. *Cro. Jac.* 28. *Mesme Case*.

So in the Case of *Thorns*, as the diversity is in *Douglass* and *Kendale's*. In Trespass the Defendant justifies, because the place where, is an Acre; and that he is seised in Fee of a Messuage, and three Acres of Land in C. and that he, and all those whose Estate it was, &c. have used from time to time, to cut down and take *omnes spinas crescentes* upon the said place, to expend in the said House, or about the said Lands, as pertaining to the said House and Lands. The Plaintiff replies, The Lord gave License to cut the Trees down. And it was resolved, That the Lord cannot cut down  
any



## The Law of Commons.

any Thorns, nor license any other to cut them; for the Defendant prescribes to have all the Thorns, and this Prescription excludes the Lord. But if he had claimed Common of *Estovers* only, then if the Lord had first cut down the Thorns, the Commoner may not take them: But if he had cut down all the Thorns, the Commoner might have had an Affize. 1 *Bulst.* 94. *Douglass* and *Kendal's* Case, Cro. Jac. 256. *Mesme* C. se.

See the Argument of Sir *Francis North*, Attorney General, at large as to this Point. And in this Case the Court of *Common Pleas* were divided in Opinion, as appears in *Vaughan's* Reports. But after in *B. R.* The Defendant Sir *Henry North*, upon Issue joined upon the Prescription, a Verdict passed for him. But the Matter in Law came not in Question. 1 *Ventr.* 383, 390. *Potter* and *North's* Case.

A Prescription for the free Tenants, and a Custom of the Copyholders of the Manor, to have the sole Pasturage of the same Land, may have a good Commencement, and by such Prescription and Custom for the *sola & separalis Pastura*, the Lord or Owner of the Land may be totally excluded for all Times. And such Prescription and Custom may well commence; and though it be for sole Pasturage for Beasts *Levant* and *Couchant*, it's good; though it seems to be but a meer Common, yet it is but an Evidence of Common. And though it was not adjudged in that Case in *Saunders*, 1 *Rep.* yet in his 2 *Rep.* 324. *Hoskins* and *Robin's* Case, it is adjudged, That the Copyholders of a Manor may have *solam*

& *separalem Pasturam* in the Soil of the Lord, and exclude him. *Vide 1 Saund. 350. Potter and North's Case, 2 Saund. 324.*

In the Argument of Sir Francis North, in Potter and North's Case, he admits the Lord, or Owner may be excluded for a certain Time, *Hut. 45. 1 Inst. 122.* and he may be stinted as to this kind of Cattle, and have none but Sheep or Horses, and so he may be stinted to a certain Number, as is in *Kenrick and Par-giter's Case, Yelv. 129.* and he may be excluded as to some kind of Profits; another Man may prescribe to have *omnes spinas* upon such a Waste. As in *Douglafs and Kendal's Case. 1 Ventr. 391.*

6. If the Plaintiff claims by Prescription, and the Defendant justifies by another Prescription, the Defendant ought to traverse the Plaintiff's Prescription. And therefore, in an Action on the Case one declares, That by Prescription he had Liberty, and Common of Foldage in a great Close in the Manor for 300 Sheep, as Appurtenant to the said Manor, &c. and that the Defendant enclosed, &c. The Defendant pleads by Prescription, That all those whose Estate he hath in the said Close, have used to enclose the said Close. The Bar is ill. For it's *Tantamount*; That the Plaintiff had not Common, if he used to enclose, and therefore ought to be traversed. *W. Jones Rep. 375. Day and Spooner's Case, 1 Roll. Abr. 565. Mesme Case.*

Note, One prescribes, That he and all his Ancestors had Common, &c. and did not say whose Heir he is. It's no good Avowry, because

In what Cases the Lord may be excluded.

To traverse Prescription.

The Form of Prescription.

cause it extends to all Ancestors, of part of the Father and Mother, &c. be he Heir to them or not: But the usual Form is, That he and his Ancestors, &c. and those whose Estate he hath in such Land, &c. have had Common. So in *Keble*, Prescription Personal, (*viz.*) That *A.* and his Heirs have had Common in such a place for all Cattle, is not good. *Aliter*, of a *Que Estate*. By *Davenport* at *York Assizes*. 2 *Keb.* 527.

Prescription  
for a Drift of  
Common.

Where a Prescription is for Drift of Common on a Surcharge, Distress and Impounding are of Common Right. As where Trespass was brought for taking and detaining his Cattle till 5 *l.* paid for their Deliverance; the Defendant justified for having a Drift of the Common, to see that it was not overcharged. And that the Beasts taken were then and there surcharging the Common, and therefore he took and detained them till 5 *l.* paid in Satisfaction of the Trespass: The Plaintiff demurred, and though 'twas objected, That the Prescription for a Drift of the Common did not warrant the taking a Distress for it, except he had prescribed for Distress also; yet *Curia contra*: For a Distress is a Thing of Common Right for Preservation of the Common; and accordingly gave Judgment for the Defendant. 2 *Lev.* 87.

C H A P. XVI.

*Pleading by Copyholder in reference to Common. How to be pleadsd if in the Lord's Soil, and how if in the Soil of another, and the Reason of such Pleading. How the Copyholder is to prescribe in Case of Severance by the Lord.*

**I**T was observed before, That Prescription is personal, and is always made in the Name of a a Person certain, and his Ancestors, or of those whose Estate he hath. But Custom is local and alledged in no Person; but that within such a Manor, &c. is such a Custom, and this shall serve for those which cannot prescribe in their own Name, nor in the Name of a Person certain. Now Tenant in Fee ought to prescribe in his own Name, and others which have Interest in the Name of the Lord; and there is no one that hath Interest, be he Tenant at Will, but he may enjoy it by good Pleading. Now Copyholder in Fee or for Life, may by Custom of the Manor have Common in the Demesnes of the Lord of the Manor; but then he ought to alledge the Custom of the Manor, to be *Qd' quilibet tenens custumarius, &c.* And the Nature of the Thing is not claimed, but remains a Prescription in his Kind. And tho' it's said in *Gateward's Case*, That a thing lying properly in Prescription, as Common did in that Case, being an Interest which must inhere in some Body, cannot be pleaded by way of Custom, as there they would have made

How Copyholders to plead Custom.



Common for Copyholders in the Lord's Soil, must be pleaded by way of Custom, and in the Soil of another by Prescription.

And the Reason of such Pleading.

made it for Inhabitants which are not permanent to prescribe: But yet Common for Copyholders in the Lord's Soil is allowed to be pleaded by way of Custom, for Necessity's Sake: Whereas for Common for Copyholders in the Soil of another, it must be laid by Prescription in the Lord, and yet the Nature of both is a Prescription. *4 Rep. 37. Foyston's Case, 6 Rep. Gateward's Case, Hob. 86. Day and Savage's Case.*

Now the Reason of such Pleading is this. A Copyholder cannot prescribe in his own Name, for the Exility of his Estate: But he ought to prescribe in the Lord's Name, when he claims Common out of the Land of a Stranger; but if he claims such Profit appender in the Manor, he must lay it by way of Custom; for then he cannot prescribe in the Lord's Name, for the Lord cannot prescribe to have Common in his own Soil.

Now the Form of Pleading it by way of Custom is this. *Quod infra manerium prædicti talis habetur necnon a toto tempore cujus contrarii memoria hominum non existit habebatur consuetudo qd' quilibet tenens custumarius Tenementi prædicti, &c. hath used to have Common in such a Place, Parcel of the Manor.*

Now one Commoner may alledge a Custom for Common in the Manor. For it may have a lawful Commencement, and all the other Copyholds may be extinct: As it's held in *Foyston's Case*.

*How the Copyholder is to prescribe in Case of Severance by the Lord.*

It was resolved in *Swain's Case*, when Copyholders for Life, according to the Custom, have used to have Common in the Wastes of the Lord of the Manor, or *Estovers* in his Woods, or any other Profit apprender, in any Parcel of the Manor; and after the Lord alien the Waste, or Woods to another in Fee, and afterwards grants certain Copyhold Lands and Houses for Life; such Grantees shall have Common of Pasture, or Common of *Estovers &c.* notwithstanding the Severance; for the Title of the Copyhold is *Paramount* the Severance; and the Custom unites the Common, or *Estovers*, which are as Accessories or Incidents, so long as the Land and House being the Principal, is maintained by the Custom; which customary Appurtenants are not pertaining to the Estate of the Lord, for he is the Owner of the Freehold, and Inheritance of all the Manor; but they are pertaining to the customary Estate of the Copyholder, after the Grant made to him, which Profit apprender notwithstanding the Lord's Feoffment, or Fine of the Waste or Wood, is preserved by the Custom, and is Paramount the Severance; and after the Custom had fixed a customary Interest, no Severance of the Inheritance of it, shall subvert the Copyhold. Thus far out of *Swain's Case*, and *Murrel's Case*, to shew the Nature of the Interest, which a Copyholder Commoner hath. But now, as to the Pleading by the Copyholder alter

The Nature of the Interest, which a Commoner Copyholder hath.

Copyholders,  
how to plead  
after Seve-  
rance.

Late Seve-  
rance destroys  
not the Com-  
mon.

after such Severance, it is very observable : And  
*Note*, It must be Special : For after such Seve-  
rance, the Copyholder, when he would entitle  
himself to Common or *Estovers*, he shall not  
plead generally, *Quod infra manerium talis*  
*habetur, &c. consuetudo*, for after the Seve-  
rance, the Waste, or the Woods are not with-  
in the Manor, but absolutely divided from it;  
but shall plead that until such a Time. (*viz.*)  
before the Severance *Talis habetur & a toto*  
*tempore, &c. consuetudo*, and then shew the Se-  
verance, as he ought to do where the Lord  
of the Manor aliens the Freehold and Inheri-  
tance of the Copyhold. As it was in *Murrel's*  
*Case*. And in like manner it was adjudged in  
*Day and Watt's Case*. The Plaintiff in *Re-*  
*plevin* rejoins, that by Custom all the Co-  
pyholders of *Black Acre*, in the Manor of *D.*  
used to have Common in *A.* To which the  
Avowant demurred, because he should have  
prescribed in the Lord's Name, *A.* being out  
of the Manor. But the Truth being, that *A.*  
was anciently Parcel, and lately severed by  
the Lord, this destroys not the Common. But  
the Copyholder ought to prescribe Specially,  
That *talis consuetudo fuit* till such a Day, and  
that after the Lord granted over, *&c.* as on  
change of a Corporation in *Lutterel's Case*,  
8 Rep. 63. 64. 2 *Brown*. 221. *Swain's Case*,  
1 Keb. 652. *Davy and Watt's Case*.

As for the way how to apply the Custom  
of a Manor to a particular Messuage in Plead-  
ing. See *Robert and Young's Case*, which was  
in *Replevin* in Bar of Conusance Damage-Fea-  
sant, the Plaintiff pleads that *H. Earl of H.*  
was seised of the Manor of *A.* whereof one  
Messuage

Messuage is Parcel, and demisable by Copy, and that within the said Manor there is this Custom; That every customary Tenant of the said Messuage, &c. have used to have Pasture in the said place called L. and so derives his Title by Grant by Copy; the Issue was upon the Traverse, *absque hoc quod infra manerium præd' talis habetur consuetudo quod quilibet tenens custumarius*, &c. have used to have Common prout, &c. Here is no Custom alledged, because it did not appear in Pleading, that this place where the taking was supposed to be, was within the said Manor, and no Custom of the Manor can extend out of the Manor, but he ought to prescribe in the Manor. Note, He ought to have pleaded that the Place in which, is Parcel of the Manor, and then the Plea had been good. *Hob. 286. 1 Brownl. 172. Roberts and Young.*

The place in which, must be pleaded to be Parcel of the Manor.

The Custom was alledged, that all customary Tenements *habuerunt & habere consueverunt separalem Pasturam*, &c. It was excepted to this Plea, that the Copyholders have not shewed what Estate they have in their customary Tenements; but *per Cur'*. It's not material, for be their Estates what they will, in Fee, for Life or Years, Custom has annexed this sole Feeding as a Profit Appreuder to their Estates, and this they claim by the Custom of the Manor, and not by Prescription, *2 Saund. 326; 327. Hoskins and Robins.*

Copyholders need not shew what Estates they have.

It was observed by the Lord Chief Justice *Vaughan* in *North and Cole's Case*, where the Defendant pleads in Trespass, That there are divers Frehold Tenements, Time out of Mind, in the said Manor, &c. and that there are

N

and



and were *infra eandem villam* divers customary Tenements Parcel of the said Manor, grantable *ad voluntatem Dom'* by Copy, and that all the Tenants of the free Tenements, Time out of Mind, *habuerunt & usi fuerunt*, and all the Tenants of the customary Tenements, *per consuetudinem ejusdem manerii in eod' manerio a toto tempore supradict' usitat' & approbat' habuerunt & habere consueverunt solam & separalem pasturam*, &c. for all their Cattle, &c. That this Plea doth not set forth the Custom of the Manor implicitly, that the freehold and customary Tenants have had and enjoyed *per consuetudinem manerii solam & separalem pasturam*, for all their Cattle, which is a double Plea, both of the Custom of the Manor, and of the Claim by reason of the Custom, which ought to be several, and the Court shall judge, and not the Jury, whether the Claim be according to the Custom alledged; for the Custom may be different from the Claim, *per consuetudinem manerii*, if particularly alledged, *Vaughan 253. North and Cole*,

A Prescription for a Copyholder to cut Boughs of Trees is well laid by way of Custom. *2 Brownl. 329.*

Where a Copyholder prescribes for *Estovers* in the Soil of another; and he saith that all Copyholders *ejusdem tenementi usi sunt*, &c. where he ought to have said *ejusdem manerii*, &c. this Prescription was adjudged void. *21 Ed. 4. 6. 36 b. 63. b.*

Plead.

Pleadings of Lords and Copyholders in Reference to Common.

**Pror** seisit' de manerio huit Communia p se & tenentibus suis ad voluntatem in terra post blada asportata usq; reseminaconem & quando jacet frise p totu annum & in prato post fenum asportat' usq; purificac per donu manerii here comuniam pro tenentibus custumariis. Ra. Entr. 622. Hern. 117, 124.

**Her** seisit' de manerio huit comuniam pastur in bosco pro se & liberis tenentibus & custumariis manerii pro omnibus abertis per totu annu. Co. Entr. 656.

**Quer** seisit' de manerio huit comuniam pasture pro tenentibus custumariis Messugii & tetrar in 10. **Her** Pasture pro omnibus abertis per totu Annu. Co. Entr. 9. 9 Rep. 112. Hern. 117.

**Donu** seperaliu maner' huere condnna pasture pro tenentibus custumariis causa Vicenagii de injur sua propria & travetle prescript. Co. Entr. 10.

**Trans** Bar per prescript de communia in clauso parcell maneris **Repl** ptestando quod clausum non est pcell manerii pro psto de injuria sua propria & traverse prescript. 3 Brownl. 418.

Bar in Replevin, that he is Copyholder of another Manor, of a Copyhold called P. and prescribes for Common in loco quo, &c. omni tempore anni pro omnibus abertis communialibus Levant and Couchant sur se Copyhold Appell P. & quod posuit

**averia utendo communia.** *Repl per* **Traverse que barbits la fuer** *Levant and Couchant*; and demurs, the Traverse not being good. But by four Judges, the Traverse was good. It's an essential part of the Plea, and the Avowant hath Election to traverse any part of the Plea which goes to the end of the Action or Justification. *Winch. Entr. 970.*

Custom pleaded **pur aver comun in loco in quo, &c.** *Replse de son tozt demesne & Traverse que les avers fuer* *Levant and Couchant sur le Copyhold tempore quo, &c.* **Rejoinder & issue sur le Traverse,** *Winch. 1068 and 1071.*

After **primam Consuram** after *Lammas-day to Lady-day*, and that none may put in Cattle during that Time. The Plaintiff demurs; because being Lord, and having **Primam Consuram**, he cannot be excluded, but by a Prescription for sole Pasture; to which the Court inclined. 2. It was to lie fresh after the **Consure**, and before *Lammas*, in Melioration of the Common, and the Cattle were put in after **Consure**, and before *Lammas*, for which an Action on the Case might lie. But the Commoner cannot distrain before his Interest begins. 3 *Reb. p. 737. Bennett and Mous. Noy 130. 2 Cro. 208. 2 Roll. Abr. 267.*

Plead **qd' custumarii tenentes debent here solam & separalem pasturam cum liberis tenentibus pro omnibus averiis (barbits except)** *Levant and Couchant.* 1 *Saund. 247. 2 Saund. 321.*

**Per Lessee de Copyholder de Turbis fossis in Communia Pasture,** *Hern. 80. 86.*  
Justi.

**Iustificat in Transgr per Com̄ per Custom infra Manerū pro defect sufficien̄ sententia Def. existen Lessee pur̄ans dun Widow que tenuit terras per Custom quamdiu innupta & casta viveret.**

**Transgr. Iustific per Comon & prescribe dond ut Manerij.** Tomp. 371, 379, 392, 418.

**Plead que customary Tenants usi sunt here seperalem Pasturam come Appurtenant Tenementis suis.** 2 Saund. 351.

**Def. in Transgr. Pledge seberally pro defect sufficien̄ sententiar' & monstr' lour title al Copyhold Estates.** Tomp. 410.

**Custom Pledge quod tenen̄ Customarii huere comunia Pasture per tot̄ annum in terris parcel Manerii.** Hern. 81.

**Simile in terris non allegat fore parcel Manerii.** Hern. 108.

**Simile pro abet vocat Hogs-beasts, Neat-beasts Levan, &c. per tot̄ annum.** Co. Entr. 10.

**Simile pro bobus levan a festo ad festum in Pastura.** 3 Brownl. 61.

**Simile in 7 Acris terre post bladamel & asportat ex eisdem & resid camporum usq; Annū nisi interim seminat.** 3 Brownl. 91.

**Iustificat per Comon per Custom per un̄ Copyholder.** Tomp. 410.



## C H A P. XVII.

*Of other Pleadings in Reference to Common. What must be traversed or not. Traverse superfluous. Traverse Tantamount. Averment. Uncertainty in Pleading. Justification in Trespass by a Commoner. Who may join in such Justification or not. Servant or Supervisor of a Common. How to plead in Trespass or Replevin. Where de Injuria sua propria is a good Replication or not. Rejoinder by Approvement, where good. Prescription to be pursued strictly in Pleading.*

What to be  
traversed,  
and how  
much.

**W**Here the Plaintiff in Replevin in Bar to the Avowry claims Common in six Acres, and the Defendant in his Replication shews that the Plaintiff had Common in 40 Acres, and that the Plaintiff had purchased 2 Acres of this Land Parcel of the said 40 Acres, and so had extinguished his Common: Upon Demurrer it was adjudged that he ought to traverse the Common of the Plaintiff in the six Acres only; for in the Bar to the Avowry the Plaintiff has shewed, that he has Common in six Acres, and the same shall be intended Common in the six Acres only; for Common in forty Acres cannot be intended Common in six Acres. 1 Leon. p. 43. Kimpton and Bellamys, 2 Saund. q. 207.

In Trespass the Defendant justifies, for that B. was the Owner of the two Acres, and that he and all, &c. had Common of Pasture in B. Moor, *pro omnibus averiis recumbant* super the

the said 2 Acres, &c. The Plaintiff said that B. was seised of 200 Acres, whereof the 2 Acres were Parcel, *absq; hoc* that he had Common in the said 2 Acres Parcel of the said 200 Acres. Verdict was that he had not Common in the 2 Acres; and it was moved in Arrest of Judgment, that the Traverse was ill, and contrary to it self; for he had pleaded before that he had Common in the 2 Acres Parcel of the 200, and in the Traverse he seems to contradict it, and so the Issue is ill joined. But *per Cur'*. It's a good Issue at first that he had Common to the 200 Acres as Parcel, but not in Gros; then when he goes further and saith Parcel, &c. it's idle and superfluous. 1 Roll. Rep. 28. Newcomb and Burworth.

Traverse superfluous.

The Plaintiff pleads in Bar to the Avowry, That Sir I. G. was seised, &c. and that he and all his Ancestors, &c. have used to have for him and all his Tenants for Years and at Will, &c. Common in the place where, for all their Horses and Colts, and that he put in the Horses, &c. The Defendant rejoined that in the Place where it was used Time out of Mind, that if the Horses of Sir I. G. or any of his Ancestors did come there by Escape, and were not put in, &c. that it should not be lawful for the said T. P. (under whom the Defendant made Conisance as Bailiff) to distrain them Damage-Feasant, but to put them out peaceably; and said, that the place, &c. was inclosed, and that the Plaintiff brake down the Inclosure, and put in his Cattle, for which he distrained, *absq;ne hoc* that Sir I. G. had Common in the Place where, &c.

Traverse, that  
he had not  
Common *tan-*  
*ta meunt.*

*aliter, &c.* This is no good Traverse. for he did not confess, That Sir J. G. had any Common; and therefore he ought to traverse, That Sir J. G. had any Common there. And the Court said, That Pleading had been better, for in truth he had not confessed any Common. Yet it seems good as it is; for this liberty, that this Cattle shall be there without being distrained, is in the Nature of Common, and therefore he must plead so. *Cro. Eliz. p. 60. Peck and Wirral's Case.*

Averment.

A Prescription for Common for all Sheep, which are *Levant* and *Couchant* in and upon the Demesne Lands of *W.* which are, and lie in *A.* every Year, And he doth not aver, that these are Demesne Lands which lie in *A.* Yet it's held good after a Verdict. *1 Brownl. 322. Duncomb and Randall's Case.*

Uncertainty.

In *Replevin*, the Plaintiff claims Common Appendant to a Manor, or Messuage named *Gursal*, on which Issue is taken; and the Jury came, and Exception was taken; because it's not certain to which thing the Common belongs, (*viz.*) to the Manor, or to the Messuage; and the Court ordered a *Repleader.* *Anderson 31, 37. Lee's Case.*

What may be  
claimed by the  
Name of Pa-  
sture, with-  
out saying *Le-*  
*vant* and *Cou-*  
*chant.*

I shall add but one Case about Prescription for Pasturage, (which is so near a Kin to Common,) And the Pleading is observable in Sir *John Thorne's Case.* In Trespass the Defendant pleads, That the *Locus in quo vacat* *D. continet in se 100 Acres prati*; and that he is seised in Fee of the Manor of *S.* and prescribes to have Pasture for two Geldings, from the first of *May*, until the  
Grass

Grass there grown be cut and made into Hay, as to his Manor aforesaid appertaining. And so justifies the putting them in, and the Continuance till the 20th of *June*. And avers, That the Grass was not cut down and made into Hay, till the 20th of *June* aforesaid. *Per Cur<sup>o</sup>*, This may well be claimed by Name of Pasturage, without any Averment, that they were *Levant* and *Conchant*; and in so great a Quantity of Land, the two Geldings cannot so defoul it, but that it may be made into Hay. But the Plea was held ill, for three incurable Faults. 1. The Trespass is *in equis bobus & vaccis*; and he justifies for two Horses, and saith nothing of the Residue. 2. The Trespass is alleged the 8th of *May*, 43 *Elix.* with a *continuando* till the 25th of *June*; and he justifies from the 8th of *May* to the 20th of *June*, and saith nothing of the 4 last Days. 3. He claims this Pasturage to his Manor of *S.* and shews not in what County this Manor lies. *Crp. Jac.* 1. 2. Sir *John Thornel* and *Lasse's* Case.

*Pleas in Justification by a Commoner in Trespass.*

Several Freeholders cannot join in a Justification for Common, but the Prescription must be made in the Name of one. 2 *Keb.*

514.

An Action of Trespass for Depasturing, &c. *Regula.* The Defendant pleads as to *Vi & Armis non* *culp<sup>o</sup>*; as for the Residue, he prescribes in the  
Lord



Lord for Common, for Beasts *Levant* and *Couchant*; and justifies as Servant to the Lord, by Entry to view the Cattle, which were caused to be put upon the said Common, to see *ne aliquid detrimenti eis eveniret*. The Plea is ill, because he doth not say he put them there; but saith only, That the Cattle were in the Place where, &c. and it appears, that the Cattle were not the proper Cattle of the Defendant; and then if he did not put them in, he is Not guilty. For a Man may not be guilty of Trespass with Cattle, unless that they are his proper Cattle, or that he actually put them into the Place where, &c. and so the Plea being ill in part, is ill for the whole. 1 *Saund.* 27. Earl of *Macclesfield* and *Vale*.

How a Man may be guilty of Trespass, or not.

How one that is a Servant to several must plead.

Supervisor of a Common, how to plead.

Turfs not to be burned for Damage-Feasant.

In an Action of Trespass the Defendant saith, That such an one had Common there, and such a one, and such a one, and he as a Servant put in a Beast, and as a Servant to the second put in two Beasts, and a Servant to the third put in the Remnant; this is good and not double. *Aliter*, if he had said, he as their Servant put in the Beasts. But when one as Supervisor of a Common, by the Custom of a Manor takes Beasts, which surcharge the Common, and impounds them, he shall not avow but justify in (*Replevin*) for he had not any Interest, nor ought to have a Return. 15 *H.* 7. 10. 7 *Ed.* 4. 29.

An Action of Trespass was brought for burning the Plaintiff's Turfs. The Defendant justifies, because the Turfs were upon the Land where he had Common, (and shews

shews Title to it ) and for Damage Feasant he burned the Turfs. The Plaintiff demurs, and had Judgment ; for the Defendant cannot burn the Turfs for this Cause. Sir Tho. Jones's Rep. 139. Bromball and Norton's Case.

If the Party in his own Right, or as Servant to another, claiming Interest in the Land, or to any Common, or Rent issuing out of the Land, or Way, or Passage upon the Land, there *de Injuria sua propria* is no Plea generally. But if the Defendant justify as a Servant, there, in some of the said Cases, it's a good Plea with Traverse of the Command, this being made Material. 8 Rep. 67. Crozat's Case.

Where *de injuria sua propria* is a good Replication or not.

In *Replewin*, For taking 4 Oxen at C. in the Common of L. in a place called D. The Defendant saith, The place was 4 Acres in C. which was his Freehold, &c. The Plaintiff in his Bar to the Avowry, that the place where, lies in H. quarter Parcel of a Field in C. and that the Plaintiff, &c. was seised of one Messuage, &c. and that the Plaintiff, and all those whose Estate, &c. ought to have Common, and so prescribed to have Common for all commonable Beasts, *Levant* and *Couchant* on the said Tenements. After Verdict *pro Quer'*, Judgment was arrested, because it did not appear by the Bar to the Avowry, in what place the Messuage and Land, to which the Common did appertain, did lie ; whether in C. or any other Place or County ; and this of necessity ought to have been shewed in certain, and shall not be intended to be in C. where the Common

Place and County, where Land to which, must be shewed.

mon is ; for a Common may be Appurtenant, or Appendant to Land in another County ; and the Trial shall be of both Counties. See *Cro. Jac.* But being after a Verdict for the Plaintiff, a Repleader was awarded. *1 Brownl. 188. Broxbal and Thorold, Mesme Case.*

A Plea to  
Debt for  
Rent.  
Suspension.

Enclosure of  
Common, no  
Plea in Debt  
for Rent.

Prescription  
to be pursued  
strictly in  
pleading.

An Action of Debt for Rent upon a Lease for Years ; The Defendant pleads, and confesseth the Lease and Reservation, but saith further, That the Lessee and all those whose Estate, &c. have had Common in 10 Acres in E. always for Beasts *Levant* and *Couchant* upon the said Tenements, every Year after the Corn sown from *August* the 7th until the Corn reaped and carried away ; and that before any Rent was due, Sir N. S. the Lessee enclosed the said 10 Acres, wherein he ought to have had his Common, and ejected him so as he might not use his Common, and so the Rent is extinct : And a Demurrer.

1. Because this Land enclosed is not alledged to be sown with Corn, otherwise by his Prescription he is not to have his Common. 2. Because he did not shew he kept it enclosed with Force ; otherwise he may break the Hedges and take the Common. 3. The Allegation, That he enclosed the Common whereby the Rent is extinct, is a vain Allegation : For the Rent is not issuing out of the Common, and so there can be no Suspension. *Cro. Jac. 679. Sir N. Sanderson vers. Harison.*

In an Action of Trespas for Impounding Sheep. The Defendant justifies for Damage-Feasant ; The Plaintiff replies for Common

mon for all Cattle *Levant* and *Couchant* on his Tenement. The Defendant rejoins by *Approval*, for that he left sufficient Common for all Cattle then *Levant* and *Couchant* on his Tenement. *Per Cur'*, The Rejoinder is good. 2 *Keb.* 590. *Leech* and *Midgley's* Case.

In an Action of *Trespafs* for taking of 40 Sheep, and chasing them, by Reason whereof one died. The Defendant pleads, That the place, &c. was his Freehold, and that he *leniter* chased them, *quæ est eadem Transgressio*, &c. The Plaintiff replies and justifies for Common. The Defendant rejoins by *Enclosure*. The Plaintiff demurs. Though he does not answer to the chasing of the Sheep, yet it's good enough; for the Plaintiff replies by his *Replication* upon the Common, and waves the chasing of the Sheep. *Raym.* 185.



## C H A P. XVIII.

*Of Prescription in a Forest. For what Cattle.  
Who may join in one Claim. Prescription  
in a Forest disforested.*

Who may  
join in one  
Claim for  
Common or  
not.

Copyholders  
joining.

**A**LL the Inhabitants in *Egham-Forest* joined to have Claim for all Cattle commonable. *Per Cur'*, They ought not to have joined in one Claim. It is true, Tenants in ancient Demesne may join in a Claim for Common, &c. because the King cannot claim for them; but other Men, if Copyholders, they must only join who are Tenants to one Lord, and the Lord must prescribe for him and his Tenants. *W. Jones Rep. p. 276, 286.* The Case of the Inhabitants of *Egham*.

Those that claim Common and have Right, it must be enquired by the Ministers of the Forest, whether they use Staff-herding? That is, for one to follow their Cattle, *W. Jones's Rep. 282.* Dean and Chapter of *Salisbury's* Case.

For all Cattle  
and Swine.

A Special Verdict was found, upon which the Question was, Whether or not a Prescription for Common of Pasture, for all Cattle and Swine in a Forest, at all times in the Year, was a good Prescription or not? *Per Cur'*, The Prescription is ill; and it was not found expressly, that it was a Forest; and so Judgment was for the Defendant. It appeared to have been disforested, and a few Words in a Special Verdict found after

afterwards, shall not by Inference and Construction make it a Forest again: And it must have been a Forest Time out of Mind, &c. or the Prescription cannot here come in Question. *Hard. Rep. 87. Woolridge and Dove's Case.*

See *Manwood*: Prescription of Common for For Geese, Sheep, Geese, Goats and Hogrells in a Forest Goats. is not good. *Bridgman's Rep. 26.*

A Prescription for Common of Pasture, for all Cattle and Swine in a Forest at all Times of the Year, is not a good Prescrip- For Swine: tion. *Hard. Rep. 87. Woolridge and Dove's Case.*

A Prescription for Common *pro 4 vaccis & dimidio unius vaccae* Levant and Couchant. It Prescription for half a Cow, should have been said for the half Feeding of how to be a Cow; yet good after Verdict. So tho' pleaded. it is not said *post falcationem grani*, generally from such a Day. *1 Keb. 793. Hill. and Allen's Case.*

A Man had a Coppice within a Forest, in which others have Common, and he cuts the Coppice and encloseth it according to the Statute of 22 Ed. 4. which gives liberty to enclose for 7 Years, this shall not exclude the Commoner. *W. Jones's Rep. 235.*

*Vide plus* of Prescription, Chap. 15 and 19.

## Precedents of Pleadings.

## Of Common for a time Certain.

Avowry pur Damage-Feasant. Bar' Quæſiſtus de Manerio habuit totum herbagium terre quando jacet friſca. Co. Ent. 609.

Repl' Per Maintenance de Franktenement & Traverſe le Preſcription.

Bar' Quid quæſiſtus de terris in jure uxoris habuit Communiam pro omnibus abeſſis a feſto ad feſtum. Reg. Jud. 35.

Repl' Quid Locus fuit ſeperalis & non Communis.

Avowry al' Damage-Feasant. Bar' Quid quæſiſtus de Meſſuagiis & terris habuit Communiam Paſture in Paſtura parcella campi quolibet anno quo campus fuit ſeminar enim piſis a feſto ad feſtum. 3 Brownl. 202.

Repl' Quid B. fuit ſeiſtus de Manerio unde Paſtura in quo, &c. eſt parcella, & R. ſeiſtus de pred Meſ. & terris tene de Maner in Socag': Et R. infra tempus memorie feoffavit B. de Meſ. & terris predice & B. poſtea feoffavit defendi de manerio. Et ſic Communia eſt extincta per uniti del Poſſeſſion.

Bar'

Bar' *Quæ seistus de Mes. & terris habuit Communiam in moza per tot annum & in sex Acris prati unde, &c. post fenum asportat.* Ra. Ent. 552.

Repl' *Quæ moza & pratum sunt seperale solum, & Traverse Prescription de Common.*

Pleading Prescription for Common Appurtenant, for every two Years, when the Field is sown with Grain, from the first of *August* till *Lady-day*, in Parcel being Pasture, and in the Residue after the Corn carried away. 1 *Saund.* 222.

Prescription for Common of Pasture in a Field, except one Acre, whereof he is seised from, &c. 1 *Saund.* 221.

Prescription for Common Appurtenant after the Corn carried away, until it be sown again, and for all the third Year. 2 *Saund.* 3.

Traverse Prescription of Common of Pasture. 1 *Saund.* 223.

For all the Year.

Bar' al' Avowry pur Damage-Feasant. *Quæ seistus de Messuag' & terris habuit Communiam in Loco in quo, &c. pro omnibus averiis per tot annum.* Ra. Ent. 559.

Repl' *Quæ non huit Communiam ibidem.*

*Prescriptio p' Herbage & Pasturage in 5 Acris.* Winch. p. 6.

O

For



## For Beasts.

Bar' al' Avowry pur Damage-Feasant. **Qd** quer' seistus de Messuag' & terris in Com Lanc' habuit Communiam Pasture pro omnibus averiis communicabilibus Levan, &c. per tot' annum in terris in Com Eborum ubi captio, &c. Rejoinder per Maintenance de Franktenement & Traverse del Prescription. Et ex assensu ven' fac' agard' Vic Eborum. 2 Brownl. 367.

Bar' al' Avowry pur Damage-Feasant. **Qd** quer' seistus de un' Acra terre vocat', &c. habuit Communiam in 12 Acris terre 2 annis concurrentibus post blada messa pro omnibus grossis averiis Levan, &c. Quousque herba forset' cum eis super depast' & postea cum 100 Ovis usque reseminationem & quolibet tertio anno cum 100 Ovis. 3 Brownl. 298.

Repl' Pur Maintenance de Avowry & Traverse de Prescription.

Bar' al' Conisance ut Ballivus Damage-Feasant. Bar' **Qd** quer' seistus de Messuagio habuit Communiam pro omnibus vaccis mulgibilibus per tot' annum. Ash. 389.

Repl' Pur Maintenance de Conisance & Traverse de Prescription.

Similis

**Similis cognitio.** Bar' Qd quer seistus de Mes. & terris habuit Communiam de glandibus pro omnibus porcis annulac tempore glandium. Hern. 642. 742.

**Avowry pur Damage-Feasant.** Bar' Pur Common Appurtenant pur nombze per Prescription. Traverse the Prescription, Placit. Gen. & Spec. 519, 520.

**Bar' Pur Common de Pasture in campo unde Locus in quo est parcel.** Thomps. 266, 267, 271.

**En Repl' per 3. Defend avow pur Damage-Feasant.** Chescun Defendant justifie seperation pur Common. Placit. Gen. & Spec. 496.

**Avowry per Lessee de Manor.** Bar' Qd Inhabitantes ville habuere, &c.

**Avowry pro Amercement pro super-  
oneratione Communie.** I Brownl. 11.

**Bar' per Prescription de Common. Et Traverse qd tempore Amerciamenti fuit residens infra Manerium.** Brownl. 337. I Brownl. 11.

**Avowry, Qd Def. seistus de Messuag & terris habuit communiam in Loco in quo, &c. pro omnibus grossis averiis per tor annum. Et qd ipse cepit averia damnum fac.** Co. Ent. 573.

**Bar' Qd Rector Ecclie seistus de Manerio habuit communiam Pasture pro**  
D 2 tenene

## The Law of Commons.

tenent Custumariis Mel. & terrarum  
pro omnibus grossis averiis per tot an-  
num.

Repl' Per maintenance de Avowry, and  
Traverse Prescription alledged by the Plain-  
tiff.

Qd' Def. seistus de Mel. habuit  
communiam Pasture in prato, &c.

Bar' Qd' Quer' est seistus de 5 Acris  
parcella prati, & posuit averia ibidem  
ad depascend', and Traverse the Prescription.  
Hern. 661.

Custom qd' pars magni campi 3 An-  
nis insimul fuit seminat' & quarto anno  
debet jacere frisca. Hern. p. 91.

Custom qd' Inhabitantes in antiquis  
Messuagiis ville habuere communiam  
Pasture in terris adjacentibus. 3 Browl.  
446.

Simile p omnibus averiis Lebam, &c.  
a Michaelmas ad purificac. Ra. Entr.  
559. 624.

Quod manerij appropinquabit partem com-  
munie. Ra. Ent. 626. Hern. 645.

## C H A P. XIX.

## Of Venues and Issues.

*Venue, where to be tried. Issue arising out of two Vills; and of Prescription, how laid, &c.*

**I**N Affize of Common *in confinio Comita-* Affize of  
*tus*; and the Issue is, Whether Common by Common in  
 Prescription in Land in one County may be *confinio comi-*  
 Appendant to a Manor in another County? *tatus*, how to  
 This shall be tried by both Counties, six be tried.  
 ought to be sworn of each County. But in  
*Sheldens's* Case, seven of one and six of the  
 other tried it by Assent, and the Parties releas-  
 ed Errors. In an Action on the Case, the De-  
 fendant declares, That he was seised of a  
 Messuage and certain Lands in *B.* to which  
 Land, Time out of Mind, &c. he had Com-  
 mon Appendant in 400 Acres of Land in *L.*  
*M.* That the Defendant had enclosed it, and  
 so disturbed him of the Common. The De-  
 fendant pleads, He set up a *Vaccary* on part the Land in  
 of it, necessary, &c. *absque hoc*, that the Plain- which and the  
 tiff had Common; and found for the Plain- Land to  
 tiff. Now the *Venire* and Trial was of *L. M.* which,  
 only, where it ought to be also of *B.* where  
 the Land was; and this Mistrial is out of the  
 Statute of *Jeofails*, & *Quer' nil cap. per bil-*  
*lam*; and he could not have a *Venire fac' de* Where one  
*novus*, for he had a Verdict given, which was shall not have  
 certified, *Trials per Pais* 91. *Cro. Eliz.* 471. a *Venire de*  
*Pasch.* 38. *El. Shendon and Hodges's Case. Cro. novo.*  
*Eliz.* 114. *Richmond and Web's Case.*



*Venire fac' de  
novo.*

Where no se-  
veral *Venire* is  
to try several  
Issues in one  
County; *ali-*  
*ter*, in several  
Counties.

In *Replevin*, for the taking of two Cows in *Buckland-Mead* in *Buckland*. The Defendant pleads, That *Buckland Mead* contains 10 Acres, whereof half an Acre was Copyhold, Parcel of the Manor of *Buckland* in *Buckland*; and that within the Manor is such a Custom, &c. and Issue thereupon, and found *pro Quer.* The *Venire fac'* was *de vicineto manerii*, where it ought to have been *de Buckland*, and so a Mistrial, altho' the Issue is upon the Custom of the Manor: For the Manor being alledged to be the Manor of *Buckland* in *Buckland*, the *Venire* ought to have been from *Buckland*, and so a *Venire fac' de novo* was awarded. In Trespass against two; one Defendant justifies the putting in of his Cattle, as a Copyholder to the Lord *Norris*; of the Manor of *D.* for Common, and Issue upon the Prescription. The other Defendant justifies as Tenant to Sir *J. F.* who was a Freeholder in *D.* who claims Common Appurtenant to his Freehold, and Issue upon that Prescription: And the Plaintiff surmising, that the Lord *Norris* was Lord of the Hundred of *D.* wherein all the Freeholders are his Tenants, and within his Distress, prayed a *Venire fac'* to the next Vill in the Hundred of *W.* and the Challenge not being denied, it was awarded, and tried at the Bar. And it was moved, That this was a Mistrial, for *quoad B.* Tenant of Sir *J. F.* this was a Mistrial. But *per Cur'*, It's a good Trial, for there shall never be several *Venire fac'* as to try several Issues in one County. But to such several Issues in several Counties, *aliter*, Cro. Jac. 302.

*Mortimer*

*Mortimer and Petifer's Case. Cro. Jac. p. 550.*  
*Dance's Case, against Eckden and Burclod.*

Any place shall be intended a Vill, unless the contrary be shewn, *Per Wyndham*, against the Lord Craven's Case. 1 *Keb.* 307.

In an Action on the Case, for disturbing of *Locus conus*. Common in *West-Fen*, on averring it to be *Locus conus* out of a Hamlet or Parish: On Demurrer to the Count for the Uncertainty of the Place, the Court conceived it well enough, and a Visne shall be *de corpore Comitatus*. 1 *Keb.* 279, 307. *Hart and Humble's Case.*

But if the Issue arise out of two Villis, the *Venire* ought to be of two Places. 2 *Bulst.* 86. *Whittiery and Lumley's Case.*

In *Replevin* in *Hexham*. The Defendant avows for Damage-Feasant. The Plaintiff by Replication claims Common to a Messuage in *Fallow-Field*, not saying *infra Jurisdic<sup>t</sup> Curia*. and on Traverse of the Common, the *Venire fac<sup>t</sup>* was of *A.* and *F. infra Jurisdic<sup>t</sup>*. *Per Hale*, This is Error, it is out of the Jurisdiction for one of the Places. Though if the Defendant plead a Plea without a Place, the Plaintiff for his Expedition may take Issue and alledge a Place. And *Per Twisden*, an Inferior Court cannot enquire *dehors*. 3 *Keb.* 116. *Blacket and Lumley's Case.*

One prescribes, that he is to have *totam Pasturam in W.* (except the Inhabitants of the Manor of *D.*) the *Venire* ought to be of *W.* for the Exception is void: For the Inhabitants are not capable; *aliter*, if the Exception had been good. As the Exception of a Person, as *J. S.* 2 *Bulst.* 87, 88. *Whittiery and Stockman's Case.*

Prescription.

But if the Issue be upon a Prescription for Common, belonging to a Messuage and 200 Acres of Land, 50 of Meadow, and 50 of Pasture, in several Villis; if the Jury find Common belonging to the House, 20 Acres of Meadow, and 20 of Pasture in two of the Villis, and not in the rest, the Prescription is not found. *Trials per Pais* 194.

A Prescription laid in the *Inhabitants* of a Place is too general, because Sojourners, Apprentices, Servants, Children, &c. are included within that Word. *Vide N. Lutw.* 425. 2 *Inst.* 703.

Nor can the *Inhabitants* of a Town or Parish prescribe for a Profit to be taken *in alieno solo. ibid.*

A Custom was alledged for the *Inhabitants* of a Parish living in antient Messuages, to have Right of Common in such a Field *ratione commorantiae*, and this was held to be a Custom against Law. 6 *Rep.* 60. *Gateward's Case.*

But *Note ibid.* a Difference between Customs which charge the Land of another, and such as go in Discharge of his own Land; and also between an Interest or Profit to be taken in another's Land, and an Easement only, as a Way over another's Land, &c. *ibid.* 6 *Rep.* 60.

A Prescription for Common Appurtenant must be for Cattle Levant and Couchant. *Vide N. Lutw.* 430, 431.

Issues.

A. prescribes to a Right of Common for commonable Cattle, and does not shew that the Cattle which he put in were commonable, 'tis ill. *N. Lutw.* 473.

So

So where one prescribes to enter a Close and dig Stones for repairing a House, he must aver, That he used the Stones to repair it, for if he sets forth that he kept them for that purpose, 'tis ill. *Vide N. Lutw.* 447, 448.

So on a Prescription for felling Trees, &c. for the like purpose. *Vide Moor* 492. *Cro. El.* 498. 593. 2 3 *Lev.* 323.

Issues.

Transf. Issue sur Prescription de Common. Def. Tensee p ans post Issue joined prie aid de Tessor. *Vet. Entr.* 123.

Verdict qd Def. non habuit communiam Pasture. *Ra. Entr.* 559, 626.

Qd Quer non het communiam per Prescription. *Hern.* 574.

Qd permittat de communia Pasture.

Bar' Qd Tenens terrarum in quibus quer clamat communiam illas tenuer inclusas. Et Traverse qd persona Ecclesie coteabit in jure Ecclesie Et qd non disseisibit. *Ra. Entr.* 539.

Locus est seperalis & non communis. *Reg. Jud.* 35.

In Avowry. Maintenance de Franktenement & Traverse le Prescription. *Co. Entr.* 609. *Hern.* 642.

Maintenance de Abowry & Traverse le Prescription. *Co. Entr.* 574. 3 *Brownl.* 399. *Ra. Entr.* 559. *Hern.* 661.

Trespas. Justificat per Prescription pur Common. *Ra. Entr.* 622, 624, 625.

Repl' De injuria sua propria & Traverse le Prescription. *Co. Entr.* 643, 648, 656. Transf.



Transf. Bar' per Prescription de communia in clausis. Ra. Entr. 622.

Repl' Clausa sunt seperale solum & liberum tenementum & Traverse Prescription.

Transf. Bar' Per Prescription de communia in B. campo & aliis Locis. Ra. Entr. 623.

Repl' B. est campus se extendens, &c. & Traverse qđ B. est parcella campi. Et ad alia Loka de injuria sua propria & Traverse Prescription.

Transf. Bar' Per Prescription de communia in clauso parcel manerij. 3 Brownl. 418.

Repl' Protestando qđ clausum non est parcel manerii, pro placito de injuria sua propria & Traverse Prescription.

Transf. Bar' Per Prescription de Foldage & pasturar vocat shack. 3 Brownl. 437.

Repl' Qđ quer' fuit seistus de terris quousque transf. Et Traverse several Prescription.

Transf. Bar' Per Prescription de Common de Estovers. 3 Brownl. 433.

Rep' Qđ terra est Franktenement & Traverse Prescription.

Transf. Bar' Per Lessee de parson del Eglise p Common. 3 Brownl. 433.

Repl'

Repl' De injuria sua propria & Traverse le Prescription.

Trans. Bar' per Custom de Common p Inhabitant'. Ra. Entr. 624.

Repl' De injuria sua propria & Traverse le Custom.

Actio sur Case de averiis fugat'. Bar' Fugabit averia Damage facien & Traverse Prescription. Hern. 175.

Actio sur Case pur Disturbance de Common. Bar' R. fuit seistus de terris ad quas habuit communiam spectan & dimisit Def. Hern. 118.

Repl' Maintenance de Bar & Traverse Prescription.

Actio pur Disturbance de Common Plea. Qd proprietarius terre dedit licentiam Def. imponere averia. Et Traverse Prescription. 3 Brownl. 250.

Actio sur Case pur Disturbance de Common. Bar' Domini seperalium manerizum habuere communiam pro tenentibus customar causa Vicinagii. Co. Entr. 10.

Repl' De injuria sua propria & Traverse Prescription.

Trans. Bar' Per Prescription de Common in R. & Traverse qd Def. est cul in R.

Repl' Qd Defend non est cul in R. Ra. Entr. 626.

Trans.

Transf. Bar' Qd Locus in quo, &c. est  
 200 Acres parcel communis pasture  
 vocat C. in qua Def. habuit commu-  
 niam Bar' Quid Quer est seistus de Ma-  
 nerio unde, &c. & Def. tenet Mes. &  
 terras de Quer & ratione tenure habuit  
 communiam & Quer inclusit partem  
 communie & Def. het communiam in  
 residuum. Ra. Entr. 626.

Repl' Def. non het sufficiend communi-  
 am in resid.

Actio sur Case de superonerat' communia,  
 Plea. qd J. fuit seistus ta de Mes. & ter-  
 ris quam de Pastura in feodo que Estate.  
 Hern. 208.

Transf. Bar' Per Prescript pro commu-  
 nia pro 400 Obibus. i Brownl. 74.

Bar' Def. usus fuit communia pro 500  
 Obibus ultra pred 400 Obes non cul  
 inde.

Transf. Bar' per Prescription pro com-  
 munia a festo ad festum pro talibus  
 averiis & Craverse qd est cul cum equis  
 & post festum. Ra. Entr. 579.

Repl' Def. est cul cum equis & post  
 festum.

Bar' Qd habuit communiam in loco  
 vocat D. continend tot Acres & exten-  
 dend. Ver. Entr. 148.

C H A P. XX.

*Of Evidence and Verdicts. What shall be a good Evidence to prove Prescription for Common. Or when a Man shall be said to fail in his Prescription in respect of fewer, or more Acres in which, &c. found; or in respect of fewer Villages than he prescribed for; or in respect of other fewer, or more Beasts than is prescribed for. Where Evidence is more narrow than the Issue. What may be given in Evidence on Traverse of a Prescription. Diversity between Prescription for Common in general, and a modus communix. Release to part of the Land where, &c. found. Enclosure of part found, that he hath Common, is no Evidence on Not guilty. Where the general Issue may be pleaded, and the special Matter given in Evidence. Where if the Substance of the Issue is found, though not modo & forma, the Verdict is good, and where not. Of entire Damages. The Declaration variant from the Writ as to the Damages, and of the Jury's finding in such Case.*

*Note, In Trials for Common, the Freeholders cannot be Witnesses one for another, nor be admitted to prove the Right of Common.*

**I**F less or fewer Acres be given in Evidence than he hath prescribed for, he has not failed in his Prescription. As, when one prescribes to have Common Appurtenant to his House, and 20 Acres of Land; and it appears upon Evidence, that he had but 18 Acres, If less or fewer Acres be given in Evidence, than are prescribed for,



res, or a less Number ; yet he hath not failed of his Prescription. *Aliter*, if 10 Acres were Freehold and ten Copyhold ; so it is, if it appears upon Evidence, That part of the Land was Copyhold an 100 Years since, but now it is Freehold. For he cannot make Prescription for both. *Cro. El. 531. Gregory and Hill's Case, Benl. 95. Yardles's Case.*

If more be found, he has failed.

Evidence in 40 Acres doth not maintain Prescription, &c.

More Acres, or more Beasts found fails the Prescription.

If found in fewer Villis than he prescribes, fails his Prescription.

But if more Acres, or more Beasts be found, then he has failed of his Prescription. As in Trespass, the Defendant justifies, by Reason of Common in six Acres of Land, upon which the Parties are at Issue, and the Defendant in Evidence shews he has Common in 40 Acres, whereof the said six Acres are Parcel, the same doth not maintain his Title, but the Issue shall be found against him. So in Trespass, and Justification for Damage-Feasant. The Plaintiff replies, and prescribes to have Common for 100 Sheep, and the Jury found he had Common for 100 Sheep and six Cows. *Per Cur'*, The Plaintiff has not failed in his Prescription alledged. But by *Walmsley*, had they found that he had Common for 120 Sheep, and so more of the same kind than he had alledged, he had failed. 1 *Leon. p. 44. in Knippton and Bellamy's Case, Cro. Eliz. 722, 723. Bushwood and Pona's Case.*

In *Replevin*, if Issue be whether *A.* and all those *que Estate, &c.* have used to have Common for all Beasts *Levant* and *Couchant* upon a Messuage, and 200 Acres of Land, 50 Acres of Meadow. and 50 of Pasture in four Villis, and the Jury found he has Common Appurtenant to a Messuage, 20 Acres of Meadow,

dow, and 30 Acres of Pasture in two of the Villis, and not of the Residue; this Issue is found against him who pleads the Prescription, for it is not the same Prescription. *Hobart p. 209. Mirtbell and Mortimer.*

If the Jury find not such Beasts *Levant* and *Couchant* as the Plaintiff counts, or such Common as he declares for, the Issue is found for the Defendant; as in *Replevin*, the Defendant justifies the taking Damage-Feasant, by reason of Common to such a Copyhold for all Beasts *Levant* and *Couchant*, and avers, that these Beasts are *Levant* and *Couchant*, &c. upon which the Parties are at Issue, and it is found that part of the Beasts were *Levant* and *Couchant*, and part not; this is found in the whole for the Defendant; for the Issue is upon the whole, and the contrary is found; for by *Doderidge*, Common Appendant and Common Appurtenant do not differ in Pleading; yet this cannot be Common Appendant here; because he claims Common for all Beasts, and in this Generality are Beasts agisting on the Land: But Common Appendant is not for Beasts agistant, therefore the Evidence is more straitned and narrow than the Issue. *2 Rol. Abr. 706. 707. Sloper and Allen.*

If not such Beasts as the Plaintiff declares for.

Evidence more narrow than the Issue.

The Case was brought for disturbing his Common, and shews the Prescription of Common, and the Disturbance by digging 4000 Turfs, and making Fish-ponds: The Defendant pleads as Lord of the Manor, that he improved several Parcels according to the Statute, leaving a sufficient Common in the Residue.

Pleading by Improvement

Verdict good  
or not, *diver-*  
*sis respectibus.*

If one pre-  
scribe for  
Common for  
all Sheep, and  
then it ap-  
pears by Evi-  
dence that he  
had not Com-  
mon for Sheep  
agistant upon  
his Land, this  
Evidence does  
not maintain  
the Prescrip-  
tion.

dne. Issue being thereupon, the Jury found *quoad* the Parcel where the digging the 4000 Turfs was, that the Defendant had not left to the Plaintiff sufficient Common, and assessed Damages; and *quoad* the digging the Fish-pond, that the Defendant had left to him sufficient Common, and Judgment *pro Quer.* for the first, and for the Defendant for the other, and the Plaintiff *in Misericord*. Berkley held, The Judgment being for the Defendant for part was erroneous; because it is one entire Issue. Croke held the Verdict good, for it is in divers respects, and the Damage to the Plaintiff is only by reason of digging of the Turfs. *Gro. Car. 495. Reeve and Digby.*

In Trespass, the Issue was if *Tho. Eyre* and his, &c. Time out of Mind, *pro se*, his Farmers and Tenants, had Common of Pasture in *vasto pro omnibus averiis Levant and Couchant* in and upon the Manor of *H. tanquam pertin'* to his Manor of *H. &c.* and in Evidence it was given, that he had Common uncertain *pro se*, his Farmers and Tenants of his Manor, for Sheep, but not for Sheep which agist the Land within his Manor. And *per totam Curiam*, This Evidence does not maintain the Prescription; for Beasts agisting the Land may be *Levant and Couchant* upon the Land: But he had prescribed for all Sheep, and saith not for all his Sheep; and it's given in Evidence, That he had not Common for Sheep agisting upon the Land: So it is *minus larga Prescriptio*, and the Words *tanquam ad manerium suum spectan.* do not aid it. But in an Action on the Case for inclosing Common, and so a Disturbance, and lays that he had Common Appur:



Appurtenant in 200 Acres of Waste to Acres of Land, 60 Acres of Meadow, and 80 Acres of Pasture; and the Verdict finds, he had Common to a Messuage, and 90 Acres of Land, Meadow and Pasture thereunto appertaining, and for the Residue that he had not Common, so as they have not found such Common whereof the Plaintiff counts, yet the Verdict is good; for the Common is but an Inducement to the Action, and the Substance is the Inclosure, which did the Wrong: *Aliter* had it been a special Issue, Whether he had Common to so much Land? 2 *Rol. Rep.* Earl of Devon and *Ayre. Cro. Jac.* 630. *Eardly's Case.*

In *Trig and Turner's Case*, The Prescription was for Common for great Cattle all times of the Year in *A. Forest* by the Tenants of *Farnham*. It was excepted to, that this is the King's Forest, and there is one Month (*viz.*) 15 Days before *St. Swithin*, and 15 Days after, which being a Fence Month, no Cattle can be put in. By *Wylde Justice*, This *Replevin* is of taking in *February*, which being no Fence Month, the Prescription might be good as to this; but this being an Issue upon a *modus* intire, by Traverse of the Prescription it must be made good for all. Now you must observe a difference between Prescription of Common in general, and a *modus communie*, or conditional Common: As the Plaintiff by Custom intitles himself to Common of Pasture in such a Place to his Copyhold, which Custom was traversed, and it was found that he ought to have the same Common, but that every Copyholder used to pay so much, &c.

P

Where upon Traverse of the Prescription, it must be made good for all.

Difference between Prescription for Common in general, and a *Modus communie*; or Conditional.

pro



*pro ead' Communia*, now this is found *pro Querente*, and it is not *Modus Communia*, and the Ter-tenant hath Remedy for the Payment; and the manner of Payment is not Parcel of the Custom in this Case; otherwise had it been if the Jury had found that the Plaintiff shall have Common paying so much, &c. as in the Case of *Lovelace* and *Reynolds*; the Defendant prescribes to have Common, and the Jury finds that he had Common there by Prescription *Prout*, &c. paying for it every Year to the Plaintiff *Id.* This Verdict is found for the Plaintiff, and is found against the Defendant who pleads the Prescription; for the Prescription is entire, and the Payment of a Penny annually is Parcel of the Prescription, and it shall be intended to be as ancient as the Common. Wherefore when he prescribes to have Common generally, and it is found he used to have it paying a Penny for it, the Common which is found, cannot be intended the same Common, which he prescribed to have. And it is not like *Gray's* Case, for there the Copyholder prescribes to have Common in the Lord's Land; and it was traversed, and it was found that he had Common according to his Prescription. And it was further found, That the Copyholder in the said Manor had used to pay to the Lord *pro eadem communia unam gallinum & 5 ova per annum*; and so there were two Prescriptions, the one for the Commoner, and the other for the Lord. *Gray's* Case.

If

If a Man has Common for great Cattle and Sheep, and the Sheep be taken, and he prescribe, that he hath Common for Sheep only, and the Jury find Common for Sheep and great Cattle, the Common is found for the Plaintiff. So if one claim Common all the Time of the Year, when the Ground lies fallow, and when it is sown from such a Day unto, &c. and his Cattle are taken in the Year when it is sown, or lies fallow; it is sufficient for the Plaintiff to prescribe for Common, either in the Year when it is sown, or when it lies fallow; and if the Jury find all the Common, it is sufficiently found for the Plaintiff. So it is, if a Man have Common from such a Day to such a Day, and the Cattle are taken at a Day between the Days; and he prescribes, that he has Common in the said Time *quo*, &c. and the Jury find he had Common before that Time, the same Day and after, the Verdict is found *pro querente*. 1 *Brownl.* 177. *Johnson and Thoroughgood's Case*.

Where a Prescription is general, to have Common in all the Place where, &c. and the Jury find the Commoner, or his Ancestor releaseth (to the Plaintiff in Trespass) all his Right and Common, in part of the Land where he had the Common. This Prescription is found against the Defendant. *Cro. El.* p. 593. *Rotheram and Green's Case*. 2 *Anderson* p. 89. the same Case.

To this purpose there is a good Case in the 13 *Rep.* 65. In bar of the Avowry Damage-Feasant, the Plaintiff said, The said Acre of Land is Parcel of *Downclose*, and that

Release of Right and Common in part of the Land where he had Common found.

What may be given in Evidence on Traverse of a Prescription.

## The Law of Commons.

that he himself at the Time, and before the taking, &c. was, and yet is seised of two Yard-lands with the Appurtenances in L. aforesaid, and that he, and all those whose Estates he has, &c. have used to have Common of Pasture *per totam contentam* of the said Downclose, whereof, &c. for four other Beasts, two Horse-Beasts, and sixty Sheep, &c. as to the said two Yard-lands appertaining, and that he put in the said two Oxen to use his Common. The Defendant maintained his Avowry, and traversed the Prescription. And so Issue. The Jury found a Special Verdict. That R. M. Father of the Plaintiff, and the now Plaintiff was seised of the two Yard-lands, and that the said R. M. had the said Common of Pasture, and R. M. so seised in 20 El. did demise to W. T. and J. F. divers Parcels of the said two Yard-lands, to which, &c. (*viz.*) the four Buts of Arable Land, with the Common and Intercommon to the same belonging for the Term of 400 Years, and that they entred and were possessed. And R. M. died so seised, by which the said two Yard-lands in Possession and Reversion descended to the Plaintiff. *Per Cur'*, This ought to be found against the Defendant, who has traversed the Prescription. For though all the two Yard-lands had been demised for Years; yet the Prescription made by the Plaintiff is true; for he is seised in his Demesne as of Fee of the Freehold of the two Yard-lands. And without question the Inheritance and Freehold of the Common after the Years determined is Appendant to the said two Yard-lands.

lands. But if he would take advantage of the matter in Law, he ought, confessing the Common, to have pleaded the said Lease. But when he traverseth the Prescription, he cannot give the same in Evidence. But if the said Lease had been pleaded, yet the Common during the Lease for Years is not suspended, or discharged; for each of them shall have Common rateable. 13 Rep. 65. *Morse and Heb's Case, Vide 2 Brownl. p. 297. Mesme Case.*

If the Issue be whether A. and all those whose Estate he has in a Messuage, &c. have had Common for so many Beasts, &c. time out of Memory. It is not any Maintenance of the Prescription to give in Evidence, a Common *Per cause de Vicinage*; because this Common does not only commence by Prescription, but with the Prescription and the Consideration, and the other shall have Common in his Land. 13 H. 7. 13. b.

The Defendant prescribes in general to The Jury have Common in all the Place where, &c. found a Release and Issue was upon the Prescription, and the Jury found a Release in part of the Land, the Prescription is found against the Defendant. *Cra. El. 593. Rotberam and Green's Case.*

In an Action of Trespass the Defendant pleads, That he has an ancient Tenement in the said Place, and that he and all the several Freeholders together, with the Copyholders, by Custom Time out of Mind have had the sole and several Pasture in the said Place excluding the Lord. The Plaintiff replieth, and traverseth the sole Feeding,



The Nature  
of Common.

Feeding, and the Defendant's Evidence was, That the Tenants used to to mow and provide Fodder for Winter. But this is no Evidence, Common being to be taken *per le Bouch.* 2 *Keb.* 577. *North* and *Howland's* Case.

Enclosure of  
part, tho' but  
one Acre,  
made the Pre-  
scription for  
Common Ap-  
purtenant in  
several fail.

In an Action of Trespass by the Plaintiff as Commoner of *Sir Rob. Henley*, in *Newland* in *W.* for Common Appurtenant. The Defendant justifies under *Sir Winston Churchil* to enclose as Lord of the Soil, alledging this to be only Common of *Vicinage*, (which was agreed might be enclosed.) The Evidence for the Plaintiff was, by foddering and driving into the Place in Question, enclosed by *Sir Winston Churchil*. The Defendant's was, by Entry at a certain Place, and foddering in the other by Leave, and by the Enclosure of part of *Blackamore-beath*, which was the grand Common which enclosed all the rest. Which Enclosure of part, though but one Acre, made the Prescription fail for the whole, being not excepted, and so the Plaintiff was nonsuited. 3 *Keb.* 24. *Harding* and *Brooks's* Case.

Upon an Issue of Common Appendant, &c. Common *pur cause de Vicinage* cannot be given in Evidence. For it is not agreeable to the Issue. 12 *H.* 7. 13.

Where a Common was from *Lady-day* to *Michaelmas*, and the Verdict finds from *Christmas* to *Michaelmas day*, it is good. *Keb.* 192.

Difference be-  
tween Tres-  
pass and A-  
vowry, *qd'*  
*permittat.*

In an Action of Trespass for disturbing him of his Common belonging to an 100 Acres, and the Jury found Common for 50.

This

This is for the Plaintiff; otherwise upon an *Avowry* or *quod permittat*, which is founded upon the Right; but the Trespass is for Damage. *Palmer's Rep.* 289.

If he who hath the Freehold in the Ground, That he hath doth bring an Action against the Commoner, Common is no for entring into his Ground; if the Defendant Evidence on pleads Not guilty, he cannot give in Evidence Not guilty. that he hath Common there, for such Evidence will not maintain the Issue. *2 Leon.*

202.

If when the House is down, an Assize is Where in Assize brought for the *Estovers* Appendant, the Tenant may plead the general Issue *nul Tort*, *vers*, the Tenant may *nul Disseisin*, and give the special matter in Evidence. *Hob. p. 39.* plead the general Issue, and give the special Matter in Evidence.

Where, if the substance of the Issue be found, though not modo & forma, the Verdict is good, and where not.

The Plaintiff shews he is a Copyholder, Plea by Copy-*or*. and that the Lord Time out of Memory, *or*. for him and his Copyholders have had certain Pasture, and that the Defendant the first of *May* put in his Beasts, which depastured till *Michaelmas*, by which he could not enjoy his Common in so beneficial a manner. On Not guilty pleaded, The Jury found a special Verdict. *Per Cur'*, The Plaintiff declares of a The Action lies. Tho' the Plaintiff declares, declares of a That the Defendant put in his Beasts, which Misfeasance, the Jury find is a Misfeasance; and the Jury found, he did depasturing not put them in, but that they did depasture there, (which may be intended by general.

Escape) for the depasturing the Common, which is found is the Substance, and the Plaintiff is a Stranger. 9 Rep. *Mary's Case*, 2 Roll. Abr. 704. *Mesme Case*.

In *Replevin*, If the Defendant avow the taking as a Commoner, for Damage-Feasant Apr. 11 Jac. The Plaintiff in bar saith, That B. was leased of the Land, to which the Common, &c. and on the 30th of March demised this to him, *Habendum* from Lady-day before for a Year; and the Avowant traverseth this Lease *modo & forma*, upon which Issue is joined, and the Jury find, that B. made a Lease on the 25th of March. *Habendum extunc* for a Year; this is found for the Plaintiff, though this is not the same Lease that was pleaded, the Day being excluded, *extunc* includes the Feast, and from the making, excludes it; for the Issue is, whether he had such a Lease, as by force thereof he may common at the Time, which is the Substance of the Issue *modo & forma*, and the Residue is not material. But yet it must not altogether depart from the Form of this Issue, for if it had been found that he had Right of Common by a Lease from another, or as an Owner, it would not have served the Turn; for that had been clear out of the Issue both in Matter and Form. But the Jury might have found against the Plaintiff, *non dimisit modo & forma*, Hob. p. 72. *Pope and Skinner's Case*. 2 Roll. Abr. 708. *Mesme Case*.

The substance of the Issue found.

Traverse a Lease *modo & forma*.

A Verdict not altogether to depart from the form of the Issue.

*Non dimisit modo & forma*.

Verdict

*Verdict and Damages.*

B. counts that he had Common of Pasture in *Black Acre*, And that the Defendant *conculcavit* his Grass, and depastured with Geese, Horses, &c. & *unum magnum pluteum Luti Angl.* One great Pit of Clay *fodit*, and the Clay *cepit & asportavit, per quod* he could not enjoy his Common in so beneficial a manner as he was wont. As to the Depasturing the Defendant pleads *non cul.* As to, &c. He prescribes to have and dig Clay in the said Land, for the Reparation of his House, and so justifies. Issue was joined, and the Jury found the Defendant Not guilty *de, &c.* but that he had not such a Prescription for Clay, &c. and give Damages entirely. *Per Cur'*, This is a Wrong to the Common, though the Commoner had no Right to the Soil, and the carrying it away is Damage to the Common. The Judgment is for the Plaintiff, and the Damages are well given. And there is a difference between an Action of Trespass, and an Action on the Case. The Reason of the Judgment was upon the conclusion of the Plea. *per qd' non potuit, &c.* 2 Roll. Rep. 308, 344, *Bullen and Shaan's Case.*

Difference between an Action of Trespass, and Action on the Case. Entire Damages.

An Action on the Case was brought for enclosing of Common, to a 100 l. Damage. The Jury found the Defendant guilty to the Value of 8 s. 8 d. Damage. Error was brought, for that the Declaration was variant from the Writ, for the Writ is 40 l. and

Cafe. The Declaration variant from the Writ, as to the Damage.



The Jury find Damages under the Writ and Declaration, good. Where they vary, had they found the full in either, *aliter*.

and the Declaration of 100 l. (5 Rep. 75.) and when they vary in matter of Substance, they are not remedied by any Statute. By *Houghton*, The Damages which were found, were found upon the Declaration; but the other Justices held, they were found upon both, (*viz.*) The Declaration and the Writ; and they held, this is not Error to reverse the Judgment: And it appears by the Jury what the Verity is. But *per Dodderidge*, Had the Jury found Damages to 100 l. or 40 l. it had been Error, but here they have found under both. 2 Roll. Rep. 252. *Tarnley and Turnick's Case*.

## C H A P. XXI.

*Of Trials and Decrees in Chancery in reference to Common. A former Decree in which the Tenants were no Parties, not conclusive to them. A Commission for distinguishing Metes and Bounds. Cottages decreed to have proportionable Rates of Common. Enclosures decreed. What Customs concerning the using of Common are good or not. Of Enclosures of Common, and of Declarations, and Pleas therein. Explanation of the Statute of 22 Ed. 4. 35. and 5 H. 8. c. 7. of enclosing Woods.*

### *Trials and Decrees in Chancery.*

Improvement

**T**HE Plaintiff as Lord of the Manor by an English Bill, prayed a Decree against the Defendants, to have them concluded

cluded by a former Decree in the *Exchequer*, touching Apportionment and Improvement, by which Decree all the Tenants were bound by the Answer of 10 only, and the Consent of the rest did not appear: And the Defendants in this Suit answered, that they and all those whose Estate they have in such a Messuage, Lands and Tenements, have Time out of Mind had Common of Pasture of *Turbary*, and Liberty to dig Graved in the said Common, &c. which the Plaintiff by Replication denied; and upon Examination and hearing the Case, The Court were of Opinion, That the former Decree to which the Tenants were not Parties, doth not conclude them, and that it ought to be tried at Law, Whether they have such Common as they claim? And that the Common alledged in the Answer is void in Law, because Common without Number cannot be Appendanted to any thing but Land, and that this is Common without Number, because it is only for Beasts *Levant* and *Couchant*, and it is uncertain how many these are, there being more in some Years than in others. But it is a Common certain in it's Nature, for *id certum est quod certum reddi potest*. And that they ought to go to Law to prove the Prescriptions, which they have laid in their Answers. Which seemed hard upon the Defendants, for want of Form in their Answer, especially since the Title to Common is not the Scope of the Bill, but the Improvement, by which it is admitted they have Right of Common. *Hardress* 119. *Cbeckley's Case*, in *Scaccario*,

A former Decree to which the Tenants were not Parties not conclusive to them.

Common Sans Number cannot be Appendanted to any thing but Land.

Upon

## The Law of Commons.

A Commission for distinguishing of Metes and Bounds.  
Decree for Apportionment.

Upon a Bill concerning the Title of Common, the Court of *Chancery* awarded a Commission for the distinguishing of Metes and Bounds. 32 *Elix.*

Decree for Apportionment of Common. 9 *Car. Cockerin* against the Lord *Howard*.

After a Trial at Law, a Commission to set forth Common.

Common Decreed according to the Plowgh-land, and Cottages to have a proportionable Rate.  
No Relief, because the Plaintiff could not prescribe.  
By-Laws.

*Sewel contra Finch*: The Town had always had Common, and many Deeds speak of Use and Trust. The Court adjudged the Common to be according to the Plow-land, and Cottages not to be excepted, but to have a proportionable Rate. 2 *Car. I.*

Because the Plaintiff could not prescribe any Title of Commoning in the Waste, no Relief, in *Tucker's Case*. 15 *Car. I.*

By-Laws, or an Agreement between Townsmen concerning stinting and restraining of Cattle, and other Orders in the Fields, dismissed. 15 *Car. I.*

Enclosures decreed.

Enclosures of Waste and Common decreed, being for the common Good. In *Freak's Case*, 12 *Jac.*

Compulsion to enclose.

In *Cartwright's Case*. The Court compels certain, that would not agree to Enclosures, to yield unto the same, and binds a College that would not consent, having Lands within the said Manor. 17 *Jac.*

An *English* Bill in the *Exchequer* to have the Use of Depositions taken in the *Dutchy*, at the Trial of the Assizes. The Case was, Two Commoners in behalf of themselves, and all other the Commoners within, &c. preferred a Bill in the *Dutchy* Court, against the Owner of the Land, in which Common was claimed

claimed to have their Common, and it was decreed accordingly by the Commissioners. And now the Defendant having purchased Lands within the Common, and the now Plaintiff being then, and yet a Commoner, but not named a Plaintiff in the former Bill, prefers his Bill *in Scaccario*, (the *Dutchy Court* then being put down) against the Defendant *A.* to have Use of the Depositions taken in the former Cause. To which the Defendant demurred, because neither the Plaintiff, nor Defendant here were Parties to the former Bill. And the Demurrer was allowed, because the Parties here were not actual Parties in that Suit, though the Suit was for the same Cause, upon which the Action at Law was brought, and of general Concernment. And it seemed hard, That the Defendant here claimed under the Defendant there. *Hardress p. 22. Stanley and Peg's Case.*

Injunction in the *Exchequer*, That the Defendant should suffer the Plaintiff to enjoy a Close, with the Appurtenants until, &c. and contrary to this Order, the Defendant had put in his Cattle into the Close, and thereupon an Attachment was issued out to answer this Contempt. And he said, He put in his Cattle for a Title to Common. And *per Cur'*, This was no Breach of the Injunction, because the Common was not in Question in the Bill, but only the Title of the Close; and therefore, he was discharged of the Contempt: And the word *Appurtenants* does not include Common, to be taken in the said Close. *Lane 96. Beni's Case.*

A Bill to make use of the Deposition taken in a former Cause.

Demurrer because the Plaintiff nor Defendant here were Parties to the former Bills, allowed.

Injunction to suffer the Plaintiff to enjoy a Close, &c. the Defendant put in his Cattle for a Title to Common, no breach of the Injunction.



*Customs concerning the using of Commons, what are good and what not.*

In *Kingsmore* in *Somerset*, There is a Custom, that the Common shall be governed by a Jury of 12 Men, and in recompence of this, those of the Jury have sometimes the Commoning of so many Beasts for a Year, and sometimes they enclose a certain Quantity of Moor, for their proper Use. By *Wyndham Sider*. p. 162. in *Barret and Smith's Case*.

See Copyholders *sparsim*.

Of the Common called *Shack*. *Vide supra*.  
*Vide 7 Rep.* Sir *Miles Corbet's Case*.

Of the several certain Times laid for Commoning. *Vide supra*.

Inhabitants of a Vill, for their own private Profit, as for the well ordering of their Common of Pasture, and the like; there without Custom they may not make By-laws. And if there such be a Custom, yet the greater Part shall not bind the less, unless that also be warranted by Custom. *Vide infra*. Tit. By-laws, 5 Rep. 63.

*Of Enclosures of Common.*

An Action on the Case, for enclosing of Common stinted in Time, and how to declare. *Vide Tit.* Declaration. 2 Roll. Rep. 329.  
*Colston and Perry's Case*, 2 Keb. 838. 2 Roll. Rep. 252.

Continuance of the Enclosure to be shewed in Pleading. 2 Roll. Rep. 415.

Enclosure of Common, no Plea in Debt for Rent. *Vide Tit. Pleading. Cro. Jac. 679. Sir Nic. Sanderson's Case.*

Enclosure of part, though but one Acre, made the Prescription for Common Appurtenant in general to fail. *Vide Tit. Pleadings, and Tit. Evidence, 3 Keb. 24. Harding and Brooke's Case.*

Enclosure, where it extinguishes Common. *Vide Tit. Extinguishment and Suspension of Common.*

Enclosures decreed in Chancery. *Vide Cap. de Collateral.*

Of enclosures of Land, in which is Common *pur cause de Vicinage*, and the Consequence. *Vide supra Tit. Common pur cause de Vicinage, cap. 5.*

By the Statute of 22 Ed. 4. It is provided, That if any of the King's Subjects, having Woods growing in their own proper Soil, within any Forest, Chase or Purlieu, they may cut the said Woods, or part thereof by License of the King, or his Heirs in his Forests, Chases or Purlieus, or without License in the Forest, Chase, or Purlieu of any other Person, or to make Sale of the said Woods; and it shall be lawful immediately after the Wood so cut, to enclose the same with sufficient Hedges, to exclude all Beasts out of the said Soil, for the Preservation of the Germens, and so keep it for seven Yeats next after the Enclosure. Now the Commoners shall be excluded for the said Seven Years, for there is no saving for them. And it was resolved, That this Act shall extend not only to the Owner

## The Law of Commons.

Owner of the Soil, but to the Vendees of the Wood: And that this does not extend to the Wood of a Subject, wherein any had Common, but only to several Woods. For by the Common Law he which owned Wood, in which another had Common, may not exclude the Commoner by Enclosure, be it in Forest or Chase, or out of Forest or Chase; but he which had several Woods in a Forest, might after the cutting down enclose for three Years; and none may enclose Woods in which another had Common from a Day. But this Statute had enlarged the Time for seven Years; and this Act was made between Subjects having Woods in Forests, Chases, &c. of the one Part, and the King of the other Part; so that Commoners are not any of the Parties. *Godb. p. 167. Chalk and Peter's Case. Sir Francis Barrington's Case.*

And by the Statute of 35 H. 8. c. 7. which is in the Negative, it is, That it shall not be lawful to any Persons which have, or shall have any Woods, wherein any ought to have Common, &c. to fell and cut down the same Woods, (except it be to his own Use and Occupation,) until such time as the fourth Part of the said Ground, or Soil &c. be divided, fenced and enclosed. This Clause restrains only the Owner of the Wood to cut down his own Wood, which without question does not exclude the Commoner from his Common; and the Clause which prohibits the Commoner, that after the said Felling (*id est*) after the Division and Felling in such Part (*id est*) the fourth Part so divided no Beasts or Cattle during seven Years, shall be permitted to feed for seven Years, and

ter the seven Years, the Commoner shall have his Common again.

Avowry al Dam' Feasant de averiis in copicia. Bar' **Qd'** copicia est parcella magni bosci voc' **D.** continend 12 Copicias unde **W.** seistus per Prescriptio- nem secuit & inclusit per 8 annos, tres vel quatuor copicias in turnis suis, & re- sid' fuer' aperte pro communia. Et qd' Quer' seistus de Massuag' & terris ha- buit communia in copiciis apertis pro grossis averiis Levant', &c. 3 Brownl. 276.

Quer' seistus de Manerio habuit com- munitiam Pasture in severalibus terris tenr de Manerio & Cur Baron, &c. Def. inclusit terras per qd' amercia- tus fuit in Cur Baron ad 6s. 8d. & pena 20 l. imposse ad relinquend' eas apertas. Defend' forisfecit penam. Et ad aliam Cur Def. fuit amerciae pro inclusione p'di terrarum. Co. Entr. 118.

Q

CHAP.



## C H A P. XXII.

Of what Common a Woman shall be endowed or not. A Fine levied of Common. Grant and Render of Common. Exchange of Common for Land. Tithes. Of By-Laws about the well-ordering of Common, what are good. Whether, and how far, Leets may meddle with Common. Of the Surveyor of Commons. Forcible Entry. Aid. Occupancy. Seisin. Of Sucharging the Common, and the Presentment of it, when good. Defence of Suits by Commoners. What Common Assignable by Commissioners of Bankrupts. If Indictment lies for enclosing Common. Entry of a Copyholder Commoner, how it operates.

Collateral Incidents and Considerations, in reference to Common and Commoners.

Dower.

Of what Common a Woman shall be endowed, and of what not.

**A** Woman shall not be endowed of a Common *Sans Number*, for then the Land should be doubly charged. But of Common Appendant she shall, and so of Common Appurtenant. Now Demand may be of Lands and Common, as the Writ and Declaration made Demand of Dower in a *Messuage*, 60 Acres *terr'*, 60 Acres *prati*, 100 Acres of Pasture, & *de communia Pasturae pro omnibus averiis cum pertin'*. This shall not be intended Common in Gross without Number.

Number. And especially being after a Verdict; and by Intendment it appeared upon the Evidence, that it was such a Common as went with the Land whereof she was dowable. And if it had been Common in Gross *Sans Number*, the Judge before whom the Trial passed, would have directed it to have been found against the Defendant; and though the Words are *& de Communia Pastura*, yet it shall not be intended divided Common. Though indeed Common Appendant or Appurtenant need not be demanded, but is included in the Land *cum pertin'*. And though it be *bis petitus*, yet it is no cause to abate the Writ: For had it been pleaded in Abatement, she might have abridged her Complaint, *Cro. Car. 300. Pruet vers. Drake and his Wife. 11 Rep. 45. Godfry's Case.*

Common Appendant and Appurtenant need not be demanded, but is included *cum pertin'*.  
Abridgment of Complaint.

In a Writ of Dower the Defendant made her Demand *de tertia parte faldæ. Per Cur'*, it's not good. For if it be not of a certain Number, she shall not be endowed thereof, no more then of a Common uncertain. And if she do demand Common which is certain; yet she shall not be endowed, if she does not shew the Certainty of it. *Godb. Pasch. 21.*

*Fines.*

Where the Conufance is of Land, and a Render of Common out of it, the Writ fhall be *qd' teneat conventionem de terra, &c.* 19 Ed. 4. 9.

If the *Deforçant* acknowledgeth all his Right to be to the Plaintiff, he may render a Common out of the Land. 19 Ed. 4. 9. 21 Ed. 4. 61. b.

If a Fine be levied of a Common of Pafture in *A.* this is good, although that *A.* is not a Vill, Hamlet, or *lieu connu* out of a Vill, &c. but only the Name of the Pafture where the Common is to be taken, and this be within a Vill. 1 Roll. Abr. 19.

A Fine levied of Lands does not bar him, who had a Title of Common or a Way; the Reason is, becaufe there is no Privity. 36 H. 8.

**Fine de communia Pafture.** West's Precedents 6.

*Sile p omnib<sup>9</sup> aberiis.* Vid. p. 13.

*Sile p omnib<sup>9</sup> animalib<sup>9</sup>.* Vide p. 44.

*Pro 100 Ovibus, 10 Equis, Vaccis, porcis, &c.* Vid. 13.

**De quarta parte communie pafture.** Cro. Entr. 223.

**De communia pafture infra Foreftam de U.** Cro. Entr. 324.

**De communia pafture quam p<sup>o</sup> W. het & habere solebat pro omnibus aberiis**

riis suis in 100 Acris Pasture ipsius  
J. in A. West's Precedents 14.

De terris in S. & communia in E,  
R. Entr. 318.

*Exchange.*

A Man may exchange Common for Land.  
*Perk. Sect. 263.*

Common of Pasture may be released to the  
Tenant of the Land in Exchange for other  
Land, although this enures by way of Ex-  
tinguishment. So a Man may release Common  
of *Estovers*, to the Tenant of the Land in Ex-  
change for other Land; though it enures by  
way of Extinguishment, and it shall be a good  
Exchange. *1 Inst. 50. b.*

*Tithes.*

By the Statute of *Ed. 6.* Tithes of Cattle  
Feeding on a Common, where the Parish is  
is not certainly known, shall be paid to the  
Parson of the Parish, where the Owner of the  
Cattle lives. *Mod. Rep. 216.*

*Estovers* is not Tithable, because it is not  
renewing every Year. *Doct. and St. 171.*

A County may prescribe *in non decimando*  
of Wood. *Downton's Case. Lit. Rep. 143.*  
*Norton's Case.*

See the Statute of *Sylva cadua.*



*By-Laws.*

*Bar in Trespass, by Reason of a By-Law made amongst the Commoners, what shall be good or not.*

Ordinances or By-Laws by Custom for the Government of the Common are good. And this is not to take away the Inheritance, but for the regulating of Common. In *Replevin* the Defendant made Conusance as Bailiff to Sir J. S. for that the said Sir J. was seised in Fee of the Manor of S. whereof a great Waste called K. is, &c. Parcel, and that the said Sir J. S. and all those, &c. have had in the said Waste a Court to be holden twice every Year by the Steward of the Manor, in which Court upon reasonable Summons, all the Commoners within the said Common have used to appear, &c. and that within the Manor is such a Custom, that the Steward should out of the Commoners choose a Jury to enquire of all Purprestures and Mis-feasances within the said Common, and that the said Jury had used to make Ordinances concerning the well using of the Common, and that all those who had Common, had used to be obedient to the Performance of those Ordinances under a reasonable Pain to be set down by the Jury; for which Pains forfeited the Lords of the Manor have used to distrain: And alleges *in facto*, that at such a Court a By-Law was made by such being Jurors, whereby

whereby it was ordered that no Commoner should keep any Sheep, in the Bounds under the Meer, upon Pain of 3 s. 4 d. and for keeping Sheep against this Ordinance, and the Penalty forfeited, he distrained. The Plaintiff demurred. *Per Cur'*, It's a good By-Law. And it being proclaimed in Court as was alleged in the Plea, he being a Commoner is bound to take Notice of it, and none else need to give him Notice. And what is made by the Homage, and not by the Lord or Steward, the Commoners are to take Notice of it. *Vide infra Surchage, Jones Rep. 421. James and Tisney's Case, Cro. Car. 499. Mesme Case, 1 Roll. Abr. 365. Mesme Case. 2 Roll. Abr. 136.* Notice.

In Debt for 4 l. for Breach of a By-Law Leet. made at a Leet; which claims Custom to make By-Laws for easing and regulating their Common. Exceptions were taken. 1. It was said *us fuerunt: Sed non alloc'*, for *constituti fuerunt* such By-Laws is sufficient. 2. There should be Prescription for the Penalty as well as the By-Law. 5. Rep. Clerk's Case, *sed non alloc'*, for the Law that allows the Prescription allows the Penalty, and the Remedy is by Debt: But other Remedy, as by Distress, &c. must be prescribed for. By *Wylde and Archer*, Though the Leet hath nothing originally to do with Common, yet by Custom, as here laid, it may have such a Jurisdiction, and this Custom may have a reasonable Commencement. The Leets (it's true) in Gross cannot meddle with Common. By *Tyrrel*, the Custom is not good; it's against the Leet to meddle with Common, and

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a Court-Baron may as well thus be intitled to Pleas of the Crown; and if the Leet may make one By-Law, the Court-Baron may make another contrary. 2 Keb. 367. Earl of Exeter against Smith.

27 Aff. p. 6. it was presented in a Leet, that J. N. had inclosed such Lands, which ought to lie in Common for all the Inhabitants of a Vill, &c. *ad commune nocument' inhabitant' villæ præd'*, and this Presentment was adjudged void; for this is a private Tort to the particular Inhabitants of this Vill, and no publick Common Nuisance. *Wormleighton* and *Burton's* Case was, in Replevin, the Defendant made Conusance as Bailiff to Sir *Foulk Grevill*, for that he had Leet within his Manor of *D.* and that at such a Court, the Plaintiff was amerced for putting his Geese upon the Common there, and for that Amerciament distrained: And because it was not shewed, that the Common was within the Leet, as also, because the Court held, that it was not any Article inquirable in a Leet, nor punishable there, it was adjudged *pro Querente*, Cro. Eliz. p. 448. *Wormleighton* and *Burton*.

Presentment for Surcharging a Common is not good. Roll. Abr. 83. *Bere* and *Storer*.

A Presentment is for inclosing a Croft in which the *gens del Ville* have Common, in Annoyance of all the People of the said Vill, is not good, for an Assize lies.

Surveyor.

In *Replevin*, for taking 3 Cows at *B.* The Defendant *cognovit captionem*, for that the place where is Parcel of the Manor of *B.* being Waste, and that there were 100 Copyholders

holders there who had Common there, and shews a Custom, that they chose every Year a Surveyor of their Field, who used to distrein their Cattle Damage-Feasant, and shews that he was elected Surveyor, according to the Custom, and found the Cows there Damage-Feasant, whereupon *cognovit actionem*, and prayed a Return. Upon Demurrer it was adjudged, That this Avowry was not good: For though they had such a Custom to make a Surveyor, and that they might distrain Damage-Feasant; yet that ought to be in the Name of him who hath the Freehold, and of some Commoner, and not in his own Right; so ought the Commonprender. *Cro. Jac. 436. Stephens and Keblethway's Case.*

Surveyor cannot avow Distress in his own Name or Right.

*Forcible Entry.*

Although one may be disseised of a Rent, or Common by Force, which is enquirable at the Assize and punishable if found; yet one may not be indicted, or committed for entering his own Land with Force against a Commoner, by the Statute of 15 R. 2. for that ought to be *ubi ingressus non datur per legem*. And one in his own Land may enter lawfully, and may detain with Force against any who pretends to have Common there, he being allowed to be Owner of the Soil. *Cro. Car. 416. Sydnam and Parris's Case.*

The Owner of the Soil Not guilty of forcible Entry.

In



Aid not to be where the Issue is all in the Personalty, and the Prescription acknowledged, *aliter* if the Issue had been upon the Right.

In an Action of Trespass for cutting of certain Trees, if the Defendant justifies for Common of *Estovers*, as Lessee for Years of *J. S.* by Title of Prescription, if the Issue be taken, whether he did cut *de son tort de mesne*, or for the Cause aforesaid, the Defendant shall not have Aid of the Plaintiff, for that this Issue is all in the Personalty, and the Prescription acknowledged; but if the Issue had been taken upon the Right of *Estovers*, he should have Aid. 21 *Ed.* 3. 41.

Aid of the King.

If another demand Common out of certain Land within the Vill, by Force of a former Grant of the King; the Fee-Farmer shall have Aid of the King, for per-adventure the King had a Release, or other Discharge before the second Grant. 46 *Ass.* 1.

#### Occupant.

There may not be an *Occupant* of any thing that lies in Grant, and which cannot pass without Deed; because every *Occupant* ought to claim by a *quo Estate*, and aver the Life of *Cestuy que vie*. But *Occupancy* may be of Common Appurtenant to Land. *Co. Lit.* 41. b.

Possession, Seisin. *Vide Tit. Assize supra.*

Receiving of my Rent, or Feeding on my Common gains no Possession of my Rent, of Common, but at Election. *Hob. p.* 322.

*Surebar*

*Surcharging of Common.*

A Common divided shall be rateable, so that the Land in which, &c. shall not be surcharged. 1 Inst. 66.

In an Action of Trespass the Defendant pleads, he was the Queen's Bailiff of her Manor of B. and that at such a Court holden before one J. S. Steward there, it was presented, that the Plaintiff being Tenant of the said Manor had surcharged the Common, for which he was amerced to 6 s. 8 d. which was assessed by J. S. and J. M. Tenants there; and for that Amercement he distrained. *Per Cur'*, *Qd' presentatum fuit*

is good, though he does not alledge *ipso facto* *Qd' presentatum fuit* is that he surcharged, being pleaded by the Bailiff, to whom it sufficeth to take Cognisance of the Presentment and no more; & *non refert* as to him whether it be true or not. *Qd' presentatum fuit* is good, without alledging *ipso facto*, that he surcharged.

And the Amercement being assessed by the Steward is well enough, though not by the Suitors, it being the common Course, and the Distress is incident to it. But *per Cur'*, This Distress by a Bailiff, not having any Warrant to do it by Estreat or otherwise, is not lawful, for he cannot distrain *ex Officio*. *Cro. El. 748. Rowleston and Alman's Case.* Amercement assessed by the Steward. A Bailiff must have a Warrant to Distrain.

*Defence*

*Defence of Suits.*

Commoners may defend a Suit against them about their Right of Common, at their common Charge; for it is in effect but one Defence, and one Defendant; therefore they cannot be Witnesses one for another. But they ought not to join themselves by Oath: Nor ought they to meet in an Hostile manner. Neither must they meddle which are no way interested. *Hob. 91. Lord Howard's Case.*

*What Common is Assignable by Commissioners of Bankrupts, or not.*

*A.* had Common for a Cow in Pasture, to him and his Wife, and to the Heirs of their two Bodies begotten. *A.* the Husband grants the Common to *E.* The Wife dies *sans Issue.* *E.* is a Bankrupt: This is neither Land, Tenement or Hereditament, which may be sold by the Commissioners, *Goodwin 135.*

Entry of the  
Copp holder as  
a Copyholder  
is in Right of  
the Land.

By Rolle, If one disseise me, and a Stranger enter upon the Disseisor for me, this Entry takes away the Disseisin; and if a Copyholder of a Manor enter as a Commoner, it is in Right of the Lord, although it be not by his Command, nor he have any Notice of it. *Style p. 37c.*

*Indictment.*

*Indictment.*

*Vi & armis*, That he enclosed a Common. *Per Cur'*, This matter ought not to be indicted, but the Party grieved is put to his Action on the Case. 2 Leon. p. 117. *Willoughbies's Case*.

*I have here added some useful Choice Precedents adapted to the particular Sorts and Kinds of Common and Prescriptions, by which an ingenious Clerk may be able not only better to understand the Treatise before going, but may be directed to Declare and Plead in most Actions relating thereunto.*

Tref.



Tres. Count pur Close debruse depast' con-  
culc' & consumpt' Herbaz.

Common Bar', Black Acre.

Novel Assignment, 2 Selioas de Pasture  
in B.

Bar al Novel Assignment. Quoad partem  
non culpa.

**E**t quod fractionem claus. pzed' & con-  
culc' & consumpt' Verbe pzed' in  
pzed' duabus selionibus Pasture de nobo  
Assignat superius fieri supposit' cum  
pzed' centum & viginti obibus idem Ri-  
cus dicit qd' pzed' Iohes actionem suam  
pzed' inde versus eum habere non de-  
bet quia dicit qd' pzed' due seliones Pa-  
sture cum pertin' sunt & pzed'ito tempore  
quo, &c. fuer' jacen' in quodam com-  
muni campo vocat' Bromfeild cum per-  
tin' in B. pd' qui quid' campus vocat'  
Bromfeild quibuscumque duob' annis insimul  
concurrentibus cum bladis seminati  
consuevit & quolibet tertio Anno post  
eosdem duos Annos insimul concurrere  
pzed' sequen' jacet friscus & ad Warren-  
tam. Et idem Ricus ulterius dicit qd'  
ipsemet est & pzed' tempore quo, &c. &  
diu antea fuit seiscus de tribus virga-  
tis terre prati & Pasture cum pertin' in  
B. pzed' in dominico suo ut de feodo  
demque Ricus & omnes illi quorum sta-

tum idem Ritus modo habet & p̄d̄i tem-  
 pore quo, &c. habuit in Tenementis p̄i  
 cum p̄t̄in̄ a tempore cujus contrarij  
 memoria hominum non existit habue-  
 runt & habere consueverunt p̄o se fir-  
 mariis & tenentibus suis eozundem te-  
 nementor' cum p̄t̄in̄ communiam Pa-  
 sture in p̄d̄ia' duabus selionibus Pa-  
 sture cum p̄t̄in̄ de novo assign' cum  
 p̄t̄in̄ in quibus, &c. p̄o centum &  
 Viginti obibus suis ( videlt ) p̄o qua-  
 libet virgata terre p̄d̄ia' trium virgar  
 terre p̄o 40 Obibus super Tenementa  
 p̄d̄ia' cum p̄t̄in̄ leban' & cuban'  
 modo & forma sequen' ( videlt ) quolibet  
 anno p̄d̄ictorum duorum annorum in-  
 simul concurren' quando terre arabiles  
 p̄d̄icti campi vocat Bromfield, tum  
 bladis seminarentur tunc post blada in  
 istis terris arabilibus ejusdem campi  
 crescen' messa unie & asportat' forent &  
 postquam terre arabiles ille cum averiis  
 ferilibus Anglice Rother Beasts, and Horse  
 beasts, proprietariorum earundem terra-  
 rum arabiliam eodem anno depast' fu-  
 issent Anglice should be over-eaten quumque  
 terre arabiles ejusdem campi cum bla-  
 dis seminarentur & quolibet anno quan-  
 do idem campus vocat Bromfield jacet  
 friscus & ad Wareham tunc' omni tem-  
 pore anni tanqua' ad p̄d̄i virgar terre  
 cum p̄t̄in̄ p̄t̄in̄, Et idem Ritus  
 iterius dicit qd' p̄d̄i campus vocat  
 Bromfield, p̄d̄icto tempore quo, &c. ja-  
 cet friscus et ad Wareham per qd'  
 idem Ritus de Tenementis p̄d̄ictis cum  
 p̄t̄in̄

## The Law of Commons.

pertin in forma predicta seistus existens predictio tempore quo, &c. posuit predictas centum & viginti oves ipsius Rici que tunc fuer oves ipsius Rici proprii & super predict tres virgare terre cum pertin leban in predicta 2 seliones Pasture de novo assign cum pertin in quibus, &c. ad herbam in iisdem tunc crescent ac herbam predicta in predicta duabus selionibus Pasture de novo assign crescent predictio tempore quo, &c. cum averiis suis predicta depast fuit conculcavit & consumpsit utendo communia sua predicta prout sibi bene licuit Que quidem positio obium suarum predictarum in predicta duas seliones terre de novo assign & depast conculcatio & consumptio herbe predictae in iisdem cum predicta 120 Obibus ex causa predicta sunt eadem fractio predicta, &c. at depast conculcatio & consumptio herbe predictae in eisdem duabus selionibus Pasture de novo assign cum obibus suis predicta unde predict Johannes superius se modo queritur Et hoc paratus est verificare unde per iudic si actio, &c.

F. P.

**E**t predict Johannes quoad predicta placitum predicti Rici quoad fractionem clausi predicti ac depast conculcatio & consumptio herbe predictae cum 120 Obibus suis in predicta duabus selionibus Pasture superius de novo assign in barrum nove assign predictae superius placitum dicit quod ipse per aliqua in eodem placitum



preallegat ab acione sua predicta de  
 Transgre illa in iisdem duabus seli-  
 onibus Pasture cum pertin fac habendi  
 pelus non debet quia dicit qd predicta  
 Ricus die & anno supradictis in narra-  
 tione predicta superius specificat. Et  
 armis de injuria sua propria herbam  
 ipsius Johis in predicta duabus selioni-  
 bus Pasture cu pertin de novo assign  
 crescen cum averiis predictis depastus  
 fuit conculcavit & consumpsit prout idem  
 Johes superius versus eum inde queri-  
 tur absque hoc quod predicta Ricus &  
 omnes illi quorum statum idem Ricus  
 habet & predicta tempore Transgressi-  
 onis predicta facie habuit in predicta  
 tribus virgat terre prati & Pasture  
 cum pertin a tempore cujus contrariis  
 memoria hominum non existit habue-  
 runt & habere consueverunt pro se fir-  
 mariis & tenentibus suis eorundem te-  
 nementorum cum pertinentiis commu-  
 niam Pasture in predictis duabus seli-  
 onibus Pasture cum pertin de novo  
 assign in quibus, &c. pro 120 Obibus  
 (viz.) pro qualibet virgat terre eorundem  
 trium virgat terre cum pertin pro qua-  
 dragint Obibus super tenementa predi-  
 cum pertin levan & cuban modo &  
 forma sequen videlicet pro qualibet  
 virgata terre, &c. Et sic verbatim pro-  
 ut in placito usque ad verba (cum per-  
 tin pertinen) modo & forma prout pre-  
 dictus Ricus superius allegavit Et hoc  
 paratus est verificare unde ex quo predi-  
 ctus Transgression predictam quoad

Traverse le  
 Prescription.

R

fractionem



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fractionem Clausi p'd' depastur' concu-  
 cacōnem & consumptionem herbe pre-  
 dicte cum aberiis predictis in predictis  
 duabus felonibus Pasture de novo as-  
 signa facta superius cogit idem Iohes  
 petit iudic' & damna occasione Trans-  
 gressionis illius sibi adjudicari, &c.

D.

Rej. per main-  
 tenance de  
 Prescription  
 & Issue surceo.

**E**t p'di Ricus ut prius dicit q'd ipse  
 & omnes illi quorum statum, &c.  
 (Et sic verbat' prout in placito usque ad  
 cum pertinet pertinet) modo & forma  
 prout idem Ricus superius allegavit.  
 Et de hoc pon' se super patriam. Et  
 p'di Iohes sicut Ideo, &c.

A Custom of a Manor for Copyholders  
 to have Common.

I shall add one Precedent, to shew how a  
 Copyholder must plead Title to Common,  
 and how to lay it.

Trespas, Plead to the new Assignment.

**E**t p'dia' Willielmus dicit q'd p'di  
 Johannes accōnem suam predictam  
 de Transgressionem p'dia' in predictis pi-  
 tella & p'cia terre vocat the Orchard de  
 novo assign' p'dia' sexdecimo die S.  
 anno duodecimo supradia' superius fi-  
 eri suppoit versus eundem Williel' here  
 non debet quia dic' q'd diu ante p'dia'  
 tempus quo, &c. quidam f. S. gen  
 fuit

fuit dominus pro tempore & possessionar de Manerio de E. cum pertin in comitat pzedia' (unde unum Messuagium & sex decim ac' terr' cum pertin in E. pzedi sunt & pzedicto tempore quo, &c. nec non a tempore cujus contrarii memoria hominum non existit fuerunt parcel & Tenementa Custumaria ejusdem manerii dimiss. & dimissibit per copiam Rotulorum Cur manerii pzedia' per Dom manerii pzedia' p tempore existen vel per Seneschallum suum Cur manerii pzedia' cuicunque persone ill capet volenti in feodo simplici ad terminum vie vel annorum ad voluntatem domini secundum consuetudinem manerii pzedia' Et idem Willielmus ulterius dicit qd infra manerium pzedia' habetur & a tempore cujus contrarii memoria hominum non existit habebatur talis consuetudo usita qd omnes & singuli tenentes custumarii pzedictorum Messuagii & 16 Acrarum terre cum pertin (ut fir mari eorundem Tenementorum eum pertin) ut fuer & a toto tempore supra dicto consueverunt habere communiam Pasture in quadam pecia Pasture vocat the Westend Common in E. pzedia' continen 16 Acras quolibet Anno omni tempore Anni pro omnibus averiis suis Communicabilibus super Tenementa Custumaria pzedia' cum pertin Teban & cuban tanquam ad Tenementa Custumaria pzed cum pertinentiis pertinent p'dictoque F. de manerio pzedicto cum pertin unde, &c. in forma pzedia' posses

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sionat existend idem f. postea & ante pre-  
 dia' tempus quo, &c. scilicet ad Cur' ip-  
 sus f. manerii sui predia' tent' apud  
 maneriu' predictum (tali die & anno)  
 per quendam A. B. tunc Seneschallum  
 suum Cur' manerii predia' concessit cui-  
 dam J. K. vis predia' Mes. & 16 Acres  
 terre cum pertin' (inter alia) habend'  
 & tenend' sibi & assign' suis pro termino  
 vite sue ad voluntatem domini secundum  
 consuetud' manerii pred' virtute cujus  
 concessionis eadem J. K. postea & ante  
 predia' tempus quo, &c. in predia'is Te-  
 nementis Custumariis cum pertin' in-  
 trabit Et fuit inde seista in dominico  
 suo ut de libero Tenemento pro Termino  
 vite sue ad voluntatem Dom' secundum  
 consuetud' manerij predicti Et sic inde  
 seisse existend eadem J. postea & ante  
 prediaum tempus quo, &c. scilicet pri-  
 mo die, &c. anno undecimo supradia'  
 apud E. pred' dimisit eidem Willielmo  
 predia' Tenementa Custumaria cum  
 pertin' Habend' & occupandum eidem  
 Willielmo & assignat' suis pro Ter-  
 mino unius Anni extunc pro' sequen' &  
 plenar' complend' & finiendum Virtute  
 cujus dimissionis idem Willielm' postea  
 & ante prediaum tempus quo, &c. in  
 Tenementa Custumaria predicta cum  
 pertin' intrabit & fuit & adhuc est inde  
 possessionat'. Et idem Willielmus ul-  
 terius dicit qd' predia' Johannes est  
 & predia' tempore quo, &c. fuit posses-  
 sionat' de uno Mes. & 9 Acris terre cum  
 pertin' in E. predia' (unde predia' pi-  
 tel,



tel, & pecia Pasture vocat the Orchard cum Messuag' desuper edificat' cum pertin' superius de novo assign' sunt & p'edia' tempore quo, &c. necnon a tempore cujus contrarii memoria hominum non existit fuerunt parcelli) Quodque p'edia' Messuagium & novem Acres terr' unde, &c. contigine adjacebant p'edia' pecie Pasture vocat Westend Common Idemque Johannes & omnes alii occupatores ejusdem Messuag' & 9 Acrarum terre cum pertin' unde, &c. usi fuerunt & a tempore cujus contrarii memoria hominum non existit consueverunt facere reparare & emendare sepes & fensuras inter eadem Messuag' & 9 Acras terre unde, &c. & p'edia' peciam Pasture vocat Westend Common in E. p'edia' toties quoties necesse foret iploq' Willielmo de Tenementis Custumariis p'edia' cum pertin' in forma p'edia' possessionar' existend' ac p'edia' Johanni de p'edia' Messuag' & 9 Acris terre cum pertin' unde, &c. sicut p'efertur possessionar' existend' idem Willielmus ant' p'edia' temp' quo, &c. posuit averia sua p'edia' existend' averia sua propria super Tenementa Custumaria p'edia' cum pertin' levan' & cuban' in p'edia' peciam Pasture vocat the Westend' Common ad herbam ibidem tunc crescent' depascendi utendo communia sua p'edia' prout ei bene licuit. Et quia sepes & fensure p'edia' Messuagii & 9 Acrarum terre unde, &c. inter p'edictam peciam Pasture vocat Westend Common & p'edia' Messuagium & 9 Acras terre

Et que Pl' est possesse d'un mease, &c. parcel de premisses nouvellement assign' contigue adjacent. al Westend Common per que il doit repaier les fences perenter eux.

Et que Def. pouit averia sua pur user son Common queux pro ir-reparation des fences enter & faiont le Trespass.



unde, &c. p̄dia' tempore quo, &c. fuerunt fracta' & minime reparata' p̄dia' averia ipsius Willielmi eodem tempore quo, &c. p̄o defectu' sufficienti reparacionis sepium & censurarum eorundem messuag' & 9 Acrar' terre unde, &c. versus p̄o p̄dia' terre voc' Westend Common in p̄dia' pitell' & peciam Pasture voc' the Orchard superius de novo assign' intraverunt at bladum ac herbam p̄dia' ibidem tunc crescent' depast' fuer' & conculcaverunt & consumpserunt Et idem Willielmus eodem tempore quo, &c. in pitell' & peciam Pasture p̄dia' superius de novo assignat' intrabit & averia sua p̄dia' extra pitell' & peciam Pasture ill' fugabit ne eadem averia ulterius damnum p̄fato Johanni ibidem facerent. Et idem Willielmus ulterius dicit qđ ipse intrando in p̄dia' pitell' & peciam Pasture vocat' the Orchard superius de novo assign' ad averia sua p̄dia' extra easdem p̄ causa p̄dia' fugand' herbam p̄dia' ibidem tunc crescent' pedibus ambulando concule' & consumpsit que est eadem Transgr' p̄ ipsum Willielm' in p̄dia' pitell' & peciam Pasture superius de novo assign' p̄dia' 16 die Septem' Anno 12 suprad' ut superius fieri supposit'. Et hoc paratus est verificare, &c.

Repl' Per p̄testat' quod non habet communiam p̄ placito de son tozt demesne absque hoc qđ sepes & fensure fuer' dirupe in defectum quer'. Et Issue sur le dirupe.

Bar'

Bar to Trespass for Taking and Impounding a Cow; that the Defendants were chosen at the Leet Supervisors of the Common.

**E**c p<sup>r</sup> Thom & Johannes fric<sup>us</sup> & Phus p<sup>r</sup> G. L. Attorn<sup>um</sup> suum, &c. Et quoad res<sup>u</sup> Transgr<sup>u</sup> p<sup>r</sup>dicta<sup>m</sup> superius fieri supposit<sup>u</sup> eidem Thom, &c. dicunt q<sup>uod</sup> p<sup>r</sup>dictus Antoni<sup>us</sup> actionem suam p<sup>r</sup>dicta<sup>m</sup> versus eos habere non debet quia dic<sup>it</sup> q<sup>uod</sup> p<sup>r</sup>dicta<sup>m</sup> locus in quo supponit<sup>ur</sup> Transgressio<sup>nem</sup> p<sup>r</sup>dicta<sup>m</sup> fieri est & p<sup>r</sup>dicta<sup>m</sup> tempore quo supponitur Transgr<sup>u</sup> illam fieri fuit quingent<sup>u</sup> Mere Pasture vocat<sup>ur</sup> Holm Junes cum pertin<sup>et</sup> in H. in S. p<sup>r</sup>dicta<sup>m</sup> Quodque diu ante p<sup>r</sup>dicta<sup>m</sup> tempus quo, &c. quidam W. C. Baron fuit seistus de manerio de H. in S. p<sup>r</sup>dicta<sup>m</sup> cum pertin<sup>et</sup> unde p<sup>r</sup>dicta<sup>m</sup> quingent<sup>u</sup> Mere Pasture cum pertin<sup>et</sup> in quibus, &c. sunt & p<sup>r</sup>dicto tempore quo, &c. necnon a tempore cujus contrarii memoria hominum non existit fuerunt parcelle in dominio suo ut de feodo Quodque idem Willielmus & omnes illi quorum statum idem Willielmus modo habet & p<sup>r</sup>dicta<sup>m</sup> tempore quo, &c. habuit in p<sup>r</sup>dicto manerio cum p<sup>r</sup>tin<sup>et</sup> a toto tempore supradicto habuerunt & habere consueverunt quandam curiam visus frank pleg<sup>u</sup> de omnibus Inhabit<sup>antibus</sup> & resident<sup>ibus</sup> infra manerium p<sup>r</sup>dicta<sup>m</sup> coram seneschallo suo Et visus frank pleg<sup>u</sup> p<sup>r</sup>dicta<sup>m</sup> a tempore exist<sup>it</sup> bis per annum vide<sup>re</sup>

licet semel infra mensem Pasche & ite-  
 rum infra mensem post festum Sed Mi-  
 chaelis Archangeli infra manerium pre-  
 dicta tenend ac etiam quandam Curiam  
 baron de omnibus tenend ejusdem ma-  
 nerii singul annis de tribus septiman  
 in tres septimanas infra manerium  
 predicta tenend Et iidem Thom, &c.  
 ulterius dic qd infra manerium pdicta  
 talis betur & a tempore cujus contrarii  
 memoria hominum non existit habeba-  
 tur consuetudo qd homag ejusdem Cur  
 vis. frank pleg ad Cur visus frank pleg  
 infra manerium illud tene onerati &  
 jurati a tempore cujus contrarii me-  
 mozia hominum non existit usi fuer &  
 consueverunt ad visum frank pleg ille  
 eligere & appunctuare quatuor sufficiend  
 person de tenend ejusdem manerii fore  
 Supervisores Anglice By-Law men Com-  
 mune Pasture tenend manerii pdicti pro  
 uno anno integr tunc prior sequend Qui  
 quidem Supervisores Anglice By-Law men  
 sic electi & appunctuati a toto tempore  
 supradicta quolibet anno usi fuerunt ad  
 eorum libie & beneplacit Supervidere  
 Anglice view pdicta 500 Acres Pasture  
 cum pertind in quibus, &c. & omnes  
 alias commun tenend manerii pdicta  
 infra manerium ille Et si aliqua averia  
 aliquar personarum communiam Pa-  
 sture in pdicta 500 Acres Pasture non  
 habentium herbam in iisdem tunc cre-  
 scend depascend & damnd ibidem facien-  
 d inde foret tunc iidem Supervisores  
 a toto tempore supradicta usi fuerunt

Queux ent use  
 imparcare  
 avers de tiels  
 persons naient  
 Common, &c.  
 quæ invenerint  
 dampnificantes.



& consueverunt eadem averia ibidem sic  
indene capere & imparcare & in parco  
detinere quousq; prefat Supervisores  
per proprietate averiorum illi pro dam-  
nis in iisdem factis satisfacere possent vel ea-  
dem averia per debitum Legis cursum  
replegere possent Et iidem Thom, &c. ul-  
terius dicit qd p'dict M. C. de manerio  
p'dicto cum pertinet unde, &c. in forma  
p'dict seisse existens ad Cur. vis. frank  
pleg ipsius M. C. manerii sui p'dice-  
rent apud manerium p'dict 10 die, &c.  
eorum J. C. tunc Senesch Cur. vis.  
frank pleg manerii sui p'dice iidem  
Thom, &c. per homag Cur. vis. frank  
pleg manerii illi ad tunc & ibidem o-  
nerati & iurati iisdem Thom, &c. tunc  
tenend manerii p'dict existens electi &  
appuncti fuerunt fore Supervisores tam  
p'd 500 Acrarum Pasture cum pertinet  
quam aliarum terrarum & pasture in-  
fra manerium p'dict in quibus tenend  
manerii ejusdem communiam Pasture  
pro averiis suis habere consueverunt  
& debuerunt per quod iidem Thom,  
&c. ante p'dict tempus quo, &c.  
(scilicet) p'dict 30 die Octob Anno,  
&c. tunc Supervisores p'dicti ut prefer-  
tur existens veni ad p'dict 500 Acras Pa-  
sture in quibus comper, &c. ad eandem  
500 Acras Pasture in forma p'dicta su-  
pervidend Et quia vacca p'dict Anto-  
nii p'dict tempore quo, &c. eodem An-  
tonio nullam communiam in iisdem 500  
Acris Pasture cum pertinet habere fuit in  
p'dictis 500 Acris Pasture cum pertinet

Et quia vacca  
querentis fuit  
in Loco in quo  
Damage-Fea-  
sant illo non  
habent' com-  
muniam illi  
distrinxerunt  
& imparcave-  
runt, &c.

in



in quibus, &c. herbam in eisdem tunc  
 crescent depascen' & damnum ibidem fa-  
 cien' eidem Thom, &c. Supervisores  
 communie pdicta' ut pfertur existend vac-  
 cant illi note distinctionis pro damnis i-  
 bid facta' ceperunt & in parco aperto im-  
 parcaverunt prout eis bene licuit que  
 quid captio & imparcacio vacce pd ex  
 causa pd est eadem captio & imparcacio  
 vacce illi' unde pd Antonius superius  
 se modo queritur Et hoc parat sunt ve-  
 rificare unde per jud, &c. Precludi non  
 debet quia dicit qd diu ante tempus cap-  
 tionis averior pdice facit quidam W. L.  
 Adm fuit seistus de uno Mesuag & Cur-  
 telagio Anglice a Garth eidem Mesuag ad-  
 jacen' cum pertin' in H. in Com pdice  
 in dominico suo ut de feodo idemque  
 W. L. & omnes illi quorum statum idem  
 W. modo habet & pd tempore Transge  
 pd facit habuit in Tenementis pd cum  
 pertin' & a tempore cujus contrarii  
 memoria hominum non existit habuerunt  
 & habere consueverunt pro se firmariis &  
 tenentibus suis eorundem tenemento-  
 rum cum pertin' communitam pasture in  
 pdicto loco vocat Holme Jones in quo, &c.  
 p omnibus averiis suis communicabilib  
 super tenementum pdice cum pertin' les-  
 ban' & cuban' quolibet anno a meridie  
 festi Sed Michaelis Anglice Michaelmas-  
 day, usque ad festum Annunciaconis be-  
 ate Marie virginis tum pro' sequen'  
 tanquam ad tenementa pdicta cum per-  
 tin' spect' & prin' pd W. L. de tenemen-  
 tis pdice cum pertin' in forma pd sei-  
 situs

status existen' idem W. postea & ante p̄d  
tempus Transgr̄ p̄dict fac̄ scilicet tali  
die & anno apud H. p̄dice dimisit eidem  
Antonio eadem tenementa cum pertin'  
habend' & occupand' eidem Antonio &  
Assign' suis ab (eodem die) usque finem  
& termin' unius anni integr̄ tunc p̄or'  
sequen' virtute cujus dimissionis idem  
Antonius in crastino ejusdem diei in  
tenement p̄d cum pertin' intrabit & fuit  
inde possessor ante p̄dict tempus  
Transgressionis p̄dict fac̄, &c. scilicet  
post p̄dice meridiem p̄dice festi Sancti  
Michaelis Arch̄ anno decimo octavo su-  
pra dicto posuit vaccam suam p̄dice que  
fuit vacca ipsius Antonii propria super  
tenementa p̄dice cum pertin' in H. p̄dice  
leban' & cuban in p̄dice 500 Acres Pa-  
sture cum pertin' in quibus, &c. ad her-  
bam in iisdem tunc crescen' depascend' ac  
vacca illa p̄dice tempore Transgr̄ p̄dice  
fac̄ fuit in p̄dice 500 Acres Pasture  
cum pertin' in quibus, &c. & herbam  
in iisdem tum crescen' depascen' uten-  
do communia sua p̄dicta quousque p̄dice  
Thom̄, &c. p̄dice 30 die Octob̄ anno de-  
cimo octavo supra dicto Vi & armis p̄d,  
&c. p̄d vaccam ipsius Antonii absq' cau-  
sa rationabili ceperunt & imparcaberunt  
p̄out idem Antonius versus eos que-  
ritur Et hoc paratus est verificare, &c.

Rejoinder, By maintenance of the Bar',  
and Traverse the Prescription in W. L. for  
to have Common in the place in question.

Surrejoinder, and Issue upon the Traverse.

The

The next Precedent is of Liberty of Foldage,  
or Sheep-walk, which is in many Counties.

B. C.

Tresp. per J. B. versus T. B. and S. B. de  
Clausio tract' & Blada & Herbam de-  
past'.

**E**t quoad tract' cli p'dict' & depast' con-  
culc' & consumpt' Herbe p'd cum bi-  
dentibus p'd iidem T. & S. dic' q'd actio  
non, &c. quia dic' q'd etum p'dict' necnon  
loci in quibus supponitur Transgressio  
p'dict' fieri sunt & p'dicto tempore quo sup-  
ponitur Transgressio illam fieri fuerunt  
& Ac'r Pasture jacent jux't regiam viam  
ex parte Australi in S. p'd quodque diu  
ante tempus p'd quo, &c. necnon eodem  
tempore quo, &c. quidam T. D. gen' d' J.  
B. fuer' seiscit de quinquaginta & un' Acris  
terre cum pertin' in S. p'dict' unde una  
Acra terre & dimidi vocat' Sheep-house in  
dominico suo ut de feodo iidemq' T. D.  
& J. B. & omnes illi quor' statum iid  
T. D. & J. B. modo habent & p'd tem-  
pore quo, &c. habuerunt in p'd 51 Ac'r  
terre cum pertin' habuerunt & a tempore  
cujus contrarii memoria hominum non  
existit habuerunt & here consueverunt  
se & firmariis suis earund' quinquaginta  
& unius Ac'r terre cum pertin' liberta-  
tem saldagii Anglice a Sheep-walk and  
Sheep-house ac depast' obium p' sexaginta  
obibus eund' & depascend' in p'dict' Ac'r  
Ac'r Pasture in quibus modo & forma  
sequenti



sequenti (videlicet) quolibet anno quando idem clausum Pasture jaceret frisc & non seminat a festo S<sup>c</sup>i Michaelis Archi usque festum Annunciationis beate Marie virginis tunc prox' sequen & quando aliqua pars clausi seminari contingeret tunc in resid' pdicti clausi jaceret frisc & non seminat a festo S<sup>c</sup>i Mich<sup>l</sup> Arch usq<sup>ue</sup> festu Annunciationis, &c. tunc prox' sequen tanga ad pd' quinquagine & una Acras terre cum ptin' spectan' & ptinen' ipsilo<sup>r</sup> C. D. & J. B. de pdict' s; Acris terre ad quas, &c. in forma pdicta seisc' existen' iidem C. & S. ut servien' ipsos C. D. & J. B. & per eorum preceptum postea & ante pdictum tempus quo, &c. scil' pdict' 20 die Marii anno sexto decimo supradict' apud S. pdict' posuerunt 20 Oves ipsorum C. D. & S. in pdict' clausum frisc' minime seminat existen' ad herbam in iisdem sex Acris Pasture crescen' depascen' prout eis benelicuit Et hoc parati sunt verificare, unde, &c.

Repl' Protestando q'd pdict' C. D. & J. B. non fuer' seisc' prout, &c. de injuria sua propria. Et traverse le Custom.

Rejoind' Per Maintenance del Custom & Issue.

The



The next Precedent shall be of Common  
pur Cause de Vicinage, per Avowry.

Essex ff. **H.** R. & H. S. summonit fuerit  
ad respond. R. W. de pla-  
cito quare ceperunt averia ipsius Rici  
Et ea injuste detinuerunt contra vad. & pleg.  
&c. Et unde idem Ricus per C. B. At-  
torum suum queritur qd pda' H. R. &  
H. S. ii die Junii Anno Regni Dom-  
Regis quarto apud H. in quodam loco  
vocat le Forest ceper averia videlicet 3  
Equas & 3 Juvencos ipsius Rici Et ea  
injuste detinuerunt contra vad. & pleg. quo-  
usque, &c. unde dic qd deterior est &  
dama' her, &c. Et unde, &c.

**E**t pda' H. R. & H. S. p C. J. At-  
torum suum veni & def. &c. Et pda'  
H. S. bene advocat Et pda' H. R. ut  
ballivus ipsius H. S. bene cognovit captio-  
nem averiorum pd in pd loco in quo, &c.  
Et iuste, &c. qua die qd id locus in quo  
supponitur captionem averiorum pd fi-  
eri continebat in se mille acras terre vo-  
cat le Forest cum pertinet in H. pda'  
unde Henricus dominus H. est & pda'  
tempore quo, &c. fuit seiscitus in dominio  
suo ut de feodo quodque pda' H. S. diu  
ante pda' tempus quo, &c. necnon eod-  
tempore quo, &c. seiscitus fuit & adhuc ex-  
istit de uno Messuag. & 40 Acris terre  
cum pertinet in H. pda' in dominio suo  
ut de feodi Idemq. H. S. & omnes illi  
quorum

Avowry per  
Prescript' per  
Common de  
pasture Et  
Def. avow per  
Damage-Fea-  
sant.

quorum statum idem S. modo het & p̄  
tempor̄ quo, &c. habuit in p̄ Messuagio  
& 40 ac̄ terre cum p̄tin̄ a tempore cu-  
jus contrarii memoria hominum non ex-  
isti habuerunt & habere consueverunt  
qualibet anno omni tempore anni com-  
muniam pasture in p̄ mille Acris terre  
cum p̄tin̄ p̄o omnimodis averiis suis  
super eisdem Messuagio & 40 Acris terre  
cum p̄tin̄ leuand̄ & cuband̄ tanquam ad  
eamdem Messuaḡ & 40 Acras terre cum  
p̄tin̄ spectand̄ & p̄tinen̄. Et quia a-  
veria p̄dicta p̄dicto tempore, &c. fuer̄ in  
p̄dicto Loco in quo, &c. Verham ibidem  
tunc crescen̄ depascen̄ & damnum ibid̄  
facien̄ idem H. S. in iure suo proprio  
hene advocat & p̄dict̄ H. R. ut ballibus  
ipsius H. S. hene cogn̄ captionem ave-  
riorum p̄dict̄ in p̄dicto Loco in quo, &c.  
Et iuste, &c. damnum ibidem facien̄.

**E**t p̄ Rich̄ dic̄ q̄d nec p̄ H. S. ra-  
tione p̄dict̄ allegat captionem ave-  
riorum p̄dict̄ in p̄dicto Loco in quo, &c.  
justam advocare nec p̄dict̄ H. R. ut bal-  
libus p̄dicti H. S. eadem ratione captio-  
nem averiorum illozum in p̄dicto Loco  
in quo, &c. justam cognoscere debent Quid  
protestando q̄d p̄dict̄ Henricus dominus  
H. p̄dicto tempore quo, &c. non fuit  
seistus de p̄dicta mille Acris terre vo-  
cat le Forest cum p̄tin̄ in quibus, &c.  
in dominico suo ut de feodo prout p̄dict̄  
H. R. & H. S. superius allegaverunt p̄  
placito idem Ricus dic̄ q̄d diu ante p̄  
tempus captionis averiorum p̄dictorum  
p̄dict̄

Bar al Avow  
ry le Plaintiff  
prescribes  
pur inter-  
commoner  
Causa Vicina  
gij.

p̄dia facie quedam J. C. vidua scilicet  
 fuit de uno Messuagio sive Tenemento  
 vocat Cobbs & de 30 Acris terre prati &  
 pasture eidem Messuagio spect' sive per-  
 tinen' in H. magna in Com' p̄dia in  
 dominio suo ut de feodo Eademque  
 Jana & omnes illi quorum statum ead  
 Jana adtunc habuit in Tenementis  
 p̄dia cum pertin' a tempore cujus con-  
 tract' memoria hominum non existit habu-  
 erunt & h̄ere consueverunt p se firmariis  
 & tenentibus suis eorundem tenemen-  
 torum cum pertin' communiam pasture  
 in centum acris pasture vocat W. in H.  
 magna p̄dia pro omnibus & omnimodis  
 averiis suis super Tenementa sua p̄dia  
 cum pertin' leban' & cuban' quolibet anno  
 omni tempore anni tanquam ad Tene-  
 menta p̄dia cum pertin' spectan' & per-  
 tin' quodque p̄dia mille Acre terre  
 cum pertin' in quibus, &c. contigue ad-  
 jacent p̄dia centum Acris Pasture vo-  
 cat W. absque ulla separatione sive di-  
 visione sepium vel fenstrarum quodque  
 p̄dicta Jana & omnes illi quorum sta-  
 tum eadem Jana h̄et & p̄dicto tempore  
 captionis habuit in Tenementis p̄dia  
 cum pertin' a tempore cujus contra-  
 rii memoria hominum non existit ul  
 fuerunt & consueverunt pro se firma-  
 riis & Tenentibus suis Tenementor  
 p̄dictorum cum pertin' incommuni-  
 care causa Vicinagii in p̄dia mille  
 acris terre cum pertin' in quibus, &c.  
 p omnibus & omnimodis averiis suis  
 super Tenement p̄dia cum pertin' leban'



Et cuban' ipsaque J. de Tenementis pre-  
 dicta cum pertin' in forma predicti leuise  
 existen' eadem J. postea Et ante predictum tem-  
 pus captionis, &c. scilicet 15 die Junii  
 Anno Regi Domini Regi nunc 14 apud  
 H. predictum dimisit eidem Ricco Tenementa  
 predicta cum pertin' habend' Et occupand'  
 eidem Ricco Et assignatis suis p termino  
 duodecim annorum tunc prior' sequend' ple-  
 narie complend' Et finiend' Virtute cuius  
 dimissionis idem Riccus ante predicta tem-  
 pus captionis, &c. in Tenementa predicta  
 cum pertin' intrabit Et fuit inde posses-  
 sionar' Et sic inde possessionar' existens ante  
 predicta tempus captionis, &c. posuit aber-  
 ria sua predicta que tunc fuerunt aberria  
 ipsius Ricci propria super Tenementa pre-  
 dicta cum pertin' leban' Et cuban' in  
 predicta centum Acris Pasture vocat W.  
 ad Herbam in iisdem ibidem tunc crescen'  
 depascen' ac aberria illa eodem tempore  
 captionis, &c. de Et extra easdem centum  
 accras pasture vocat W. in predicta mille  
 accras terre cum pertin' in quibus, &c.  
 predictum tempore captionis, &c. sponte sua propria  
 euaferunt Et iverunt Et herbam ibidem causa  
 Vicinagii predictum depast' fuere quousque predictum  
 H. Et H. predictum 11 die Junii anno quarto su-  
 pradicta apud H. predictum Loco vocat le forest  
 cepit eadem aberria ipsius Ricci W. Et ea  
 iniuste detinuer' contra vad' Et pleg' quo-  
 usque, &c. Et hoc paratus est verificare  
 unde, &c.



## Trespafs.

Bar' by a Parson, that the *Locus in quo* is Common belonging to his Parsonage and Glebe-Land, *in jure Ecclesie*, &c.

Repl' per new Assignment. Bar' to the new Assignment.

**A**ctio non quia dicit q'd ipse est & p'dictio tempore quo suppon' Transgr' p'dia' fieri ac antea fuit Parsona Ecclesie de C. imparsonae in eadem & dicit q'd ipse & omnes p'edecessores sui Parsona Ecclesie ill' rone unius Messuagii vocat the Parsonage ibidem & Glebe sue p'rtin' Rector Ecclesie p'dict' habendi a tempore quo non extat memoria habuer' & h'ere consueverunt communiam pasturæ in p'dictis 100 Acris terre cum p'rtin' cum omnibus & omnimodis averiis suis infra scitum Rector p'dict' Levan' & cuban' (viz.) quibuslibet duobus annis insimul concurrerent quando terra illa seminat post blada in eisdem 100 Acris terre crescen' messa unita & asportat quousque terra illa reserminaret in eadem & quolibet tertio Anno quando terr' illa jacet fruticosa & ad waream per totum annum per q'd Idem C. p'dicta' tempore quo, &c. p' eo q'd blada in eisdem 100 Acris nup' crescen' adtunc abinde asportat fuer' poluit averia sua p'dicta' in p'dictis 100 Acris terre cum p'rtin' ad herbam in eisdem tunc crescent' depascend' utendo communia sua

sua p̄dia' & herbam p̄dia' unde, &c. in  
eisdem Acc̄ terre tunc crescendū cum abe-  
riis suis p̄dia' depast' fuit conculcabit &  
consumpsit prout ei bene licuit Et hoc  
paratus est verificare unde per iudicē si  
p̄dē R. R. actionem suam p̄dē inde ver-  
sus eum here debeat, &c. Repl̄ de son  
tozt demesne sans ceo que le Defend̄ ad  
Common la per p̄scripe & Issue sur  
ceo, &c.

Action on the Case for Enclosing Common  
with Hedges.

**I**n custodi M̄ar, &c. pro eo videlicet  
quod cum quidam W. W. gen̄ seisse  
fuiſſet in dominico suo ut de feodo de &  
in manerio de D. cum pertinē in D. in  
Com̄ p̄d ipſoque W. sic inde seisse ex-  
iſſend idem W. & omnes antecessores sui  
ac omnes illi quorum Statū idem W.  
modo habet de & in manerio p̄dia' cum  
pertinē habuer' & a tempore cuius con-  
trarii memoria hominū non existit ha-  
bere consueverunt p̄ se firmariis & te-  
nentibus suis manerii sui p̄d communis  
am Pasture in quodam loco vocat J. in  
D. p̄d continē 3 Acres Pasture p̄ om-  
nibus aberiis suis Lebād & cnbād infra  
mañ p̄d ad omnia tempora Anni tan-  
quam ad manerium p̄dia' spect' & per-  
tinenē ipſoque W. de manerio p̄dia' cum  
pertinē in forma p̄dia' seisse existiend idem  
W. 21 die Aprilis Anno, &c. apud, &c.  
dimiſſet conceſſiſſet & ad firmam tradi-  
diſſet maner p̄dia' cum pertinē p̄lato  
S 2 (Quer)

(Quer) habend & tenend manerium  
 predia cum pertin p̄fato (Quer) Cres-  
 cutozibus & Assign suis a predia 21 die  
 Aprilis, &c. Anno, &c. usque finem &  
 terminum 21 annorum extunc p̄ox' se-  
 quen & plenarie complend & finiend vir-  
 tute cujus quidem dimission idem Quer  
 in maner p̄d cum pertin intrabit & fuit  
 & adhuc est inde possessionae p̄dia tamen  
 (Def.) p̄missorū non ignar sed machi-  
 dans & intendens p̄d (Quer) de commu-  
 nia pasture sue p̄d in p̄d Loco vocat  
 J. ac de commodo & p̄oficuo inde impe-  
 dire 20 die Augusti Anno, &c. apud D.  
 predia in Com predia p̄d Locum vocat  
 J. cum sepibus & fossat inclusit ac ip-  
 sum (Quer) de communia Pasture sue  
 predia in eodem Loco vocat J. impe-  
 dit & exclusit Ita qđ idem (Quer) a-  
 veria sua in eodem Loco vocat J. ad  
 herbam ibid crescen & depascen utendo  
 communia sua predia imponit & fu-  
 gare non potuit p qđ idem (Quer) non  
 solum de communia sua predia in eo-  
 dem Loco vocat J. penit' exclus. &  
 impedit existit verū etiam idem quer  
 diversa lucra commoda & p̄oficua prout  
 ipse cum averiis suis prediam herbam  
 in eodem Loco vocat J. crescen depast  
 utend communia sua predia si predia  
 (Defend) locum illum cum sepibus &  
 fossatis non inclusit habere & lucrare  
 potuisset perdidit & amisit unde idem  
 (Quer) dic qđ deteriorat est, &c.

In Tres. Ut prius dic' qđ ipse & omnes illi quorum statum, &c. habere consueverunt pro se firmariis & tenend suis communiam pasturę in p̄dict' Loco vocat C. pro omnibus & omnimodis grossis aberiis suis communicabilibus in & super terram, &c. Leban' & cuban' quolibet anno omni tempore anni tanquam ad tenementa p̄dict' cum pertind' pertinet ac etiam ad libitum suum fodere & asportare necessar' les flaggs in p̄dict' clauso, &c. crescen' pro necessario focali suo in Messuag' p̄dict' expendend' & comburend' tanquam ad tenement' p̄dict' cum pertind' pertinet p̄out, &c. un issue trobe pro Quer' & al' p̄ Defend.

M. 31 & 32 Eliz. Rot. 2915. In Repl' Issue sur le Leban' & Couchan' Et Hill. 38 Eliz. Rot. 107 Defend' maintaine son Abowp & Cravers qđ averia p̄d fuer' Leban' & Cuban' sur p̄d tenement' Custom cum pertind' in C. p̄out, &c. vide 44 Eliz. Rot. 1917.

In Trespass ad novam Assignationem Defend' dicit quoad aliquam Transge in p̄dict' 70 Acriis p̄at cum pertind' vocat R. de novo Assign' per ipsum superius fieri suppon' p̄ter depast' concule' & consumpt' Herbe p̄dict' cum equis & bovis suis de caruc' sua non culp. Et quoad depastur, &c. placitat comon de pastur', &c. modo & forma sequent' (vid. It) quolibet anno quo idem campus vocat R. de novo Assignat' jacer' pro p̄ato sive feno  
S 3
tunc



tunc post herbam illam crescentem falcat & fenum ibidem provenientem asportat ac post appunctuationem factam per quatuor homines ejusdem ville vocat By-Lawmen a toto tempore supradictum per Inhabitantes ejusdem ville quolibet anno electi pro omnibus averiis suis carucis sue vocat Draught-Cattle usque festum Sed Mich tunc prior sequens & ab eodem festo usque festum, &c. tunc prior sequens pro omnibus averiis suis communicabilibus super tenementa predicta Leband & cuband & post idem festum Sancti, &c. omnes inhabitantes proprietates occupatores vel firmarii aliquorum terrarum pratorum vel pasturarum in eodem campo usi fuerint & a toto tempore supradictum consueverunt eadem terras pratorum & pasturam suam sepeperabiliter occupare & in usum proprium convertere quousque idem campus iterum includeretur & reserbetur pro pratorum sive feno vel cum bladis seminaretur, &c. Tr. 23. El. Rot. 513. Vide Prescripe pro Comon quolibet tertio anno jacentem friscum & quibuslibet duobus annis post quemlibet tertium annum insimul concurrentem seminare consueverunt. Tr. 23. El. Rot. 1020.

The manner of pleading where three are sued,  
and they severally plead Common.

Avowry and Cognizance for Damage-  
Feasant.

**B**AR. Et p̄dict' W. C. W. G. & C. B.  
dic' qđ p̄dict' J. ratione p̄allegata  
capcōnem averiozum p̄dictozum in p̄dict'  
loco in quo, &c. iustam advocare nec  
p̄dict' A. ea occasiōe capcōnem averiozum  
ut ballibus p̄dict' J. iustam cognoscere  
non debent quia idem W. dic' qđ diu ante  
p̄dict' tempus capcōnis averiof fact' ac  
antequam p̄dict' J. aliquid habuit in  
p̄dicto loco vocat C. cum pertin' idem  
W. seistus fuit de 22 Acriis terre & 3  
Acr' p̄ati cum pertin' in W. p̄dict' in do-  
minico suo ut de feodo Q'dque idem W.  
& omnes Antecessores sui ac omnes illi  
quozum statum ipse het de & in eisdem  
Tenementis cum pertin' a tempore cu-  
jus, &c. habuerunt & habere consueve-  
runt p̄ se firmariis & tenentibus suis ad  
terminum vite vitar' vel annozum com-  
muniā Pasture in p̄dicto loco vocat C.  
in quo, &c. p̄ 80 Ovibus & duodecim a-  
liis averiis omni tempore anni per quod  
J. B. & C. exist' possedonac de averiis  
p̄dict' cum p̄fat W. G. & C. B. ut de a-  
veriis suis p̄p̄riis p̄dict' tempore quo, &c.  
averia p̄dict' in p̄dict' loco in quo, &c. utend'  
communia sua p̄dict' ad herbam ibid' tunc  
crescen' depascend' posuit que quidem a-

beria adtunc & ibidem fuerunt utendum communia sua p̄dicta quousque p̄dicta J. & R. die & anno in narratione p̄dicta specificat averia p̄dicta apud M. p̄dicta ceper & injuste detinuer contra vad' & p̄leg quousque, &c. unde ex quo p̄d' J. superius advocat & p̄d' R. ut ballibus ipsius J. superius cognosc' cap̄onem averiozum p̄dicta petit jud' & damna sua occasione cap̄ond' & injuste detencōnis averiozum p̄dicta sibi adjudicat, &c.

**E**t p̄d' M. G. dicit q'd diu ante p̄dicta tempus cap̄onis averiozum p̄d' fact' & antequam p̄d' J. aliquid habuit in p̄d' loco vocat C. in quo, &c. quidam J. C. fuit seiscitus de uno toft' & 22 Acr terre 10 Acr p̄rat' & 2 Acr Pasture cum pertin' in M. in dominico suo ut de feodo quodque idem J. C. & omnes Antecessores sui ac omnes illi quorum statum ipse habet eisdem tenementis cum pertin' a tempore cujus, &c. habuerunt & here consueverunt pro se firmariis & tenentibus suis ad terminum vic' vitarū vel annorum communiam pasture in p̄dicta loco vocat C. in quo, &c. p octogint Obibus & 12 aliis averiis omni tempore anni Et idem J. C. sic de eisdem tenementis cum pertin' seiscitus existen' postea & ante p̄dicta tempus quo scilicet 10 die Junii, &c. Anno, &c. apud M. p̄dicta per quoddam scriptum suum indentat' fact' inter eundem J. C. ex una parte & quosdam

dam J. G. C. & eundem W. G. ex altera parte cuius alteram partem sigill' p'edict' J. C. signat' idem W. G. hic in curia p'ofert cuius dat' est etisdem die & Anno dimisit p'edict' totum 22 Acr' terre & 2 Acras Pasture cum pertin' inter alia p'efat' J. G. C. G. & W. G. &c. habend' & tenend' eadem tenementa cum pertin' eisdem J. G. C. G. & W. G. p' termino vie eorum & cujuslibet eorum diutius viventis successive virtute cuius dimissionis iidem J. C. & W. fuer' inde seisse in dominico suo ut de libero tenemento Et sic inde seisse existend' p'dict' J. G. ante p'dict' tempus quo, &c. apud W. in Com' p'edict' obiit & p'edict' C. & W. ipsum supervixerunt & se tenuerunt intus in eisdem tenementis cum pertin' Et fuer' inde seisse in dominico suo ut de libero tenemento per jus accrescend', &c. Et sic inde seisse existend' idem C. G. post & ante p'dict' tempus quo, &c. apud C. in Com' p'edict' obiit idemque W. ipsum supervixit & se tenuit intus in eisdem tenementis cum pertin' & fuit adhuc inde solus seissitus in dominico suo ut de libero tenement' per jus accrescend', &c. per q'd idem W. existend' possessionat' de averiis p'edict' simul cum p'efat' W. C. & C. B. ut de averiis suis propriis p'edicta' tempore quo, &c. utend' communia sua p'edicta Et herbam ibid' tunc crescend' depascend' posuit que quidem averia adtunc & ibidem fuer' utend' communia sua p'edicta quo.



quousque, &c. ( & sic ultra prout in placito superiori. )

**E**t p̄dict' C. B. dicit quod diu ante p̄dict' tempus capcōnis aberiorum p̄dictorum superius fact' ac diu antequam p̄dict' J. aliquid habuit in p̄dicto loco vocat C. in quo &c. quidam C. miles fuit seiscitus de Messuag' 6 Acris terre 20 Acris p̄rati & 30 Acr Pasture cum pertin' in C. D. B. & M. in Com p̄dicto in dominico suo ut de feod' q'dque idem C. C. & omnes illi quorum statum ipse habet de & in eisd' tenementis cum pertin' a tempore cuius, &c. habuer' & habere consueverunt p̄o se firmariis & tenentibus suis p̄o termino vite vitarum vel annorum communiam pasture in p̄dict' loco vocat C. in quo, &c. p̄o 80 ovibus & 12 aliis aberioris omni tempore anni Et sic inde seiscit' existend' idem C. C. ante p̄dict' tempus, &c. scilicet ( tali die & anno ) apud M. p̄dict' p̄ quandam indentur' suam fact' inter eund' C. C. ex una part' & quandam W. D. & p̄dict' C. uxorem ejus ex altera part' cujus alteram partem sigillo p̄dict' C. C. sigillat' idem C. hic in Curia p̄ofert cujus dat' est eisdem die & anno dimisit p̄dict' Messuag' 6 Acr terre 20 Acr p̄rat' & 30 Acr Pasture cum pertin' p̄fatur M. D. & C. per nomen omnium illorum Messuagiorum terrar' tenementorum lesur' & pastur' cum suis pertin' in C. D. & M. in Com D. quas J. vidua mar' p̄dict'

pdia' W. D. tunc tenuit & occupabit habend' & tenend' tenementa illa cum pertind eidem W. D. & C. & primo filio de corporibus eorumdem W. & C. legitime procreat' & eorum assign' a festo Sancti Mich' Archangeli tunc pr' sequen' Et post decessum J. D. usque finem & terminum 80 annorum extunc pror' sequen' & plenac complend' virtut' cujus dimissionis iidem W. & C. fuerunt de tali interess. & termino possessionar' Et sic inde possessionar' existend' & ante pdia' tempus quo (scilicet) tali die & anno pdia' J. D. apud W. pdi obiit post cujus quidem J. mortem pdia' W. D. & C. in pdia' Messuag' 6 Acr' terre 30 Acr' prati & 30 Acr' pastur' cum pertind inter alia intraber' & fuer' inde possessionar' Et sic inde possessionar' existend' inde W. D. ante pdia' tempus quo, &c. apud B. in Com' pdia' obiit & pdia' C. ipsum supervixit & se tenuit intus in eisdem tenementis cum pertind & fuit inde sola possessionar' per jus accrescendi, &c. per quod eadem C. existend' possessionar' de averiis pdia' simul cum p'efat W. C. & W. G. ut de averiis suis propriis p'edicto tempore quo, &c. averia pdia' in loco p'edict' vocat' C. in quo, &c. utendo communia sua p'edict', &c. (prout in superiori placito, usque adjudicari.)

Travers del Prescription. Et pdia' J. & R. quoad placit' pdia' W. C. superius in barram advocat' & cogn' suarum pdia' ut prius

prius dicunt q'd p'dia' J. fuit seistus de p'dia' loco vocor C. cum pertind in domi- nico suo ut de feodo p'out iidem J. & R. superius allegaver. Absque hoc q'b p'd M. C. & Antecessores sui ac omnes, &c. (ut prius usque) omni tempore anni p'out p'dia' M. C. superius allegabit Et hoc parati sunt verificare unde per judi- cium & retord, &c. Et quoad placitum p'dia' M. superius, &c. iidem J. & R. ut prius dicunt, &c. ut supra absque hoc, &c. ut supra Simile ad placitum B. Et p'dia' M. C. ut prius dic q'd ipse & om- nes Antecessores sui ac omnes, &c. om- ni tempore anni p'out ipse superius al- legabit & hoc per q'd inquiratur per patriam.

Et p'dia' M. ut prius dic q'd p'dia' J. C. & omnes Antecessores sui, &c. & hoc petit, &c.

Et p'dia' C. ut prius dic q'd p'dia' C. & omnes Antecessores sui, &c. & hoc petit. Ideo ad triand tam exitum illum quam alios exitus, &c.

The last Precedent I shall give you is  
for Common in Gross, by a Body Po-  
litick.

**I** S. Attach fuit ad respondē H. M. in  
Trespas upon a Close called L. Field pro  
conculcē consumpē equis bobus, &c. A.  
tio non Quia dic q'd clausū pd' necnon  
locus in quo sponit Transgr pdia' su-  
perius fieri sunt & pdia' tempore quo, &c.  
fuer 20 Acē terre cum pertinē in D. pdia'  
que quidem 0 Acē terre cum pertinē  
sunt & pdia' tempore quo, &c. necnon a  
tempore cujus contrariū memoria homi-  
num non existit fuer parcel cujusdam  
communis camp vocat A. f. in D. pd' &  
pd' J. S. ulterius dic q'd burgus de D.  
in Com D. est antiquus burgus q'dque i-  
dem J. S. est & pdia' tempore quo, &c.  
& diu antea fuit & adhuc exist' unus bur-  
gens. burgi illius q'dque burgens. burgi  
illius a tempore cujus contrarii memo-  
ria hominū not existit usq; 11 diem, &c.  
fuer corpus politicum & incorporatē per  
nomen ballivoꝝ & burgensium burgi de  
D. & per idem nomen usi fuer implitare  
& implacitari Et idem J. S. ulterius  
dic q'd in & super 11 diem, &c. idem Rex  
Carolus p̄imus p̄ literas patentes sub  
magno sigillo suo Anglie confect' gerend'  
daē apud Westm pdia' 11 die, &c. con-  
stituit & creavit ballivos & burgenses  
burgi pdia' fore extunc imperpetuum cor-  
pora,



porationem per nomen Majoris & bur-  
gens. burgi de D. p̄dia' prout per lite-  
ras paten' p̄dia' quas idem J. S. hic  
in Cus̄ p̄ofert plenius liquet & apparet  
Et idem J. ulterius dic' q'd ballivi &  
burgenses burgi p̄dia' a tempore cujus  
contrarii, &c. usque p̄dia' 11 diem, &c. &  
continue postea hucusque habuer' & per  
totum tempus p̄d' habere consueverunt  
pro seipsis & quolibet burgens. burgi  
p̄dia' communiam pasture in p̄dia' camp  
vocat L. f. unde, &c. pro omnibus eo-  
rum aberiis communicabilibus (videlicet)  
quibuscumque duob' annis insimul cōcurrē  
quando campus ille vocat L. f. unde,  
&c. aliquibus bladis seminat' fuit post  
blada illa in p̄dia' camp vocat L. f. un-  
de, &c. crescēd' messa unita & asportat'  
quousque bladis reseminaretur Et quo-  
libet tertio anno quando p̄d' camp vocat  
L. f. unde, &c. jacet friscus & ad wardē  
tunc per totum annum per quod idem  
J. S. p̄dicto tempore quo, &c. pro eo  
quod blada in eodem camp vocat L. f.  
unde, &c. eodem anno crescēd' adtunc  
messa unita & asportat' fuer' & nulla pars  
p̄dia' campi vocat L. f. unde, &c.  
aliquibus bladis reseminat' fuit po-  
suit duos spadones & duas equas qui-  
quidem spadones & duo equi fuerunt  
abera ipsius J. S. propria in p̄dicto  
campo vocat L. f. unde, &c. ad herban  
in eodem tunc crescēd' depascēd' utend'  
communiam sua p̄dia' Et herbam p̄d' in  
clauso p̄dia' in quo, &c. tunc crescēd' cum  
spado

spadonibus & equabus p̄dīa' & cum pedibus suis ambulando ea de causa p̄dīa' tempore quo, &c. depast' fuit conculcabit & consumpsit p̄out ei bene licuit Et hoc paratus est verificare unde petit iudicium si p̄dīa' H. actionem suam p̄dīa' inde versus eum here debeat, &c.

The Def. demurs generally. The Plaintiff joins in Demurrer. And the Demurrer judged good, because there cannot be a Common in Gross without Number. But the Prescription ought to have been for Beasts *Levant* and *Couchant* in the same Vill: This Prescription is for Common in Gross, without annexing it to any Land.

THE



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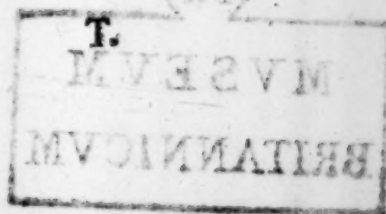
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FH

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F I N I S.

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cf.  
a.  
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